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OHIO

CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME II.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1904.

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Rec. Dec. 12, 1905

JUDGES OF THE CIRCUIT COURTS OF OHIO

FROM FEBRUARY 8, 1903, TO FEBRUARY 8, 1904.

HON. JOHN C. HALE, *Chief Justice*, Cleveland, Ohio.
HON. ULYSSES L. MARVIN, *Secretary*, Akron, Ohio.

FIRST CIRCUIT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

WILLIAM S. GIFFEN.....Hamilton
FERDINAND JELKE, JR.....Cincinnati.
PETER F. SWING.....Cincinnati

SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

THEODORE SULLIVANTroy.
HARRISON WILSONSidney.
CHARLES W. DUSTIN.....Dayton.

THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

JAMES H. DAY.....Celina.
WILLIAM T. MOONEY.....St. Mary's.
CALEB H. NORRIS.....Marion.

FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Laurence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

THOMAS CHERRINGTONIronton.
THOMAS A. JONES.....Jackson.
FESTUS WALTERSCircleville.

FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

RICHARD M. VOORHEES.....Coshocton.
MAURICE H. DONAHUE.....New Lexington.
THOMAS T. MCCARTY.....Canton.

SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

ROBERT S. PARKER.....Bowling Green.
LINN W. HULL.....Sandusky.
GEORGE R. HAYNES.....Toledo.

SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

PETER A. LAUBIE.....Salem.
JOHN M. COOK.....Steubenville.
JEROME B. BURROWS.....Painesville.

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

JOHN C. HALE.....Cleveland.
ULYSSES L. MARVIN.....Akron.
LOUIS H. WINCH.....Cleveland.

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AFFIRMED OR DISMISSED.

The following mentioned cases, reported in this volume, have been either affirmed or dismissed in the Supreme Court :

Cox v. Lancaster ; affirmed without report, February 2, 1904.

Eureka Fire & Marine Insurance Co. v. Gray ; affirmed without report, October 20, 1903.

Foxhever v. Order of Red Cross ; affirmed without report, May 18, 1903.

Trout v. Marvin ; affirmed without report, March 15, 1904.

Huron Dock Co. v. Swart ; affirmed without report, January 19, 1904.

Wade v. The State ; affirmed without report, April 5, 1904.

P., C., C. & St. L. Ry. Co. v. Stone ; affirmed without report, December 9, 1902.

Brown v. The State ; dismissed, April 27, 1903.

L. S. & M. S. Ry. Co. v. Callahan ; dismissed, January 5, 1904.

State, ex rel, v. Laylin, Secretary of State ; dismissed, October 6, 1903.

OHIO CIRCUIT COURT REPORTS NEW SERIES.

Causes Argued and Determined in the
Circuit Courts of Ohio.

VOLUME II—NEW SERIES.

FRAUDULENT CONTRACT FOR THE PURCHASE OF STANDING TIMBER.

[Circuit Court of Lucas County.]

CHARLES W. ISHAM ET AL V. BUCKEYE STAVE CO.

Decided, June 20, 1903.

Parties—Misjoinder—Rescission of Contract for Sale of Standing Timber—Right of Action as Between Personal Representative and Devisees of the Land—Conversion.

1. The right of action to declare void a contract, whereby one now deceased sold certain standing timber at a grossly inadequate price, is in the personal representative of the decedent, and not in the devisees of the land from which the timber is being removed.
2. As between the parties here concerned, the trees have been converted into personal property, and in the event of the purchaser being deprived of them in consequence of fraud in the contract of purchase, the trees would remain personal property as between the personal representative of the estate and the devisees of the land; and should the personal representative prosecute an action for rescission of the contract, he would be prosecuting it for the benefit of the personal estate, and not for the benefit of the devisees.

PARKER, J.; HULL, J., and HAYNES, J., concur.

This case is in this court on appeal. When the action was begun in the court of common pleas in March, 1902, the plaintiffs were Charles W. Isham, Sarah Isham, John W. Stebbins and John F. Isham, administrator with the will annexed of the estate of John G. Isham, deceased, and the defendant was The Buckeye Stave Company. To that petition a demurrer was filed in the court of common pleas on the grounds, (1) that there was a misjoinder of parties plaintiffs; (2) that several causes of action were improperly joined, and (3) that the petition did not state facts sufficient to constitute a cause of action.

The court below, in passing upon that demurrer, held that it was well taken and sustained it, on the ground that there was a misjoinder of parties plaintiff, and on the ground that it failed to state facts sufficient to constitute a cause of action. Thereupon an amended petition was filed, and from the amended petition Sarah Isham, and John F. Isham, as administrator, were dropped out. To this amended petition a demurrer was filed on the grounds that the plaintiffs, or either of them, had no legal capacity to bring the action, and also that the facts set forth in the amended petition did not, in law, constitute a cause of action in favor of the plaintiffs and against the defendants. That demurrer was overruled, and thereupon an answer was filed, and to the answer a reply was filed. The case was submitted to the court below upon the merits, and from the finding and judgment of that court an appeal was taken to this court.

In this court the defendant asked for and was granted leave to withdraw his answer, for the purpose of again presenting the questions raised by the demurrer to the amended petition. Upon the first presentation of these questions a majority of the court were so clearly of the opinion that the demurrer was not well taken that we resolved to proceed to trial upon the merits, reserving, however, a right to give this subject further consideration; and when the case came to be finally submitted there was more argument heard upon the demurrer, and, after a full consideration of the matter, we are unanimously of the opinion that the court below was right in its finding and judgment.

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Lucas County.

that the court below erred in overruling the demurrer; and that this court was in error in proceeding upon its first impression. We hold that the demurrer must be sustained on the ground that the facts stated do not constitute a cause of action in favor of the plaintiffs and against the defendant. I will read the averments of the petition:

"The defendant is, and at the time of the occurrences herein-after set forth was, a corporation organized and existing under the laws of the state of Ohio, and has a place of business in the village of Waterville, Lucas county, Ohio.

"Plaintiffs says that on or about the sixth day of April, 1899, and during the lifetime of John G. Isham, deceased, he was and for a long time prior thereto had been the owner of a tract of land known and described as the west one-half of the southwest one-quarter of section No. 31, in the reservation of twelve miles square in Waterville township, Lucas county, Ohio; and that said land was covered with standing timber.

"Plaintiffs further say that on or about said sixth day of April, 1899, John Fraser, the duly authorized agent of the defendant company, called at the home of said John G. Isham, deceased, and with intent to deceive and defraud said John G. Isham, deceased, and for the purpose of inducing him to part with his said timber at a grossly inadequate price, represented to him that he, the said Fraser, was an expert in estimating the quantity of standing timber; that he was regularly employed by said defendant in buying standing timber and making said estimates; that he had carefully gone over and examined the said piece of property above described, and the timber thereon, and that he estimated the said piece of timber land to contain 50,000 feet of timber, and that it would not contain more than 60,000 feet at the outside.

"Plaintiffs further say that said piece of land at said time instead of containing fifty or sixty thousand feet of timber as so fraudulently alleged and represented by said Fraser, contained about 200,000 feet of timber, all of which said Fraser then and there well knew to be true.

"Plaintiffs further say that said John G. Isham, deceased, at the time said false and fraudulent representations were made to him by said Fraser, as aforesaid, was, and for a long time prior thereto had been, an invalid, was sick and unable to leave the house, and in a weakened condition of mind and body, and that said Fraser well knew said facts to be true; that believing in the honesty and integrity of said Fraser, and being unable to

personally examine into the truth of said statements so fraudulently made on account of his said illness, and not being an expert in such matters himself, said John G. Isham, deceased, relied upon the statements and representations so fraudulently made by said Fraser, and so relying upon said statements and representations and believing them to be true, agreed to accept for said timber so standing on said land the sum of \$425, and sold the same to the defendant for said sum.

“Plaintiffs further say that on the ninth day of June, 1901, said John G. Isham became deceased; that he continued to be an invalid from the said sixth day of April, 1899, up to the time of his death, and was unable to leave the house during said time; that prior to his death, the said John G. Isham, deceased, did not discover and had no means of discovering that said tract of land contained more timber than said Fraser had represented it to contain as aforesaid; that the plaintiffs are the heirs of said John G. Isham, deceased; and that he left a will, by the terms of which said land upon which said timber stands was devised in fee simple to the plaintiffs in the following proportions, subject to the life estate of Sarah Isham, the widow of said John G. Isham, deceased:

“To Charles W. Isham the east one-half of the west one-half of the southwest one-quarter and the north one-half of the west one-half of the west one-half of the southwest one-quarter of said Section 31.

“To John W. Stebbins the south one-half of the west one-half of the west one-half of the southwest one-quarter of said Section 31.

“Plaintiffs further say that soon after said contract of sale was made the defendant entered upon and began to cut and remove said timber from said land, and that it has already cut and removed from said land about 82,000 feet of timber; that there still remains standing upon said land a much greater quantity of timber than has thus far been removed, and that said timber so remaining standing is partly upon the land of each of the plaintiffs; that said plaintiffs did not discover the aforesaid fraud of the defendant until after the said 82,000 feet of timber had been cut and removed; that neither of said plaintiffs is an expert in estimating the quantity of standing timber and had not the means of discovering said fraud until they had learned that said defendant had already removed from said premises a much greater quantity of timber than its said agent had as aforesaid represented it to contain; that on March 19, 1902, shortly after the discovery of said fraud, said plaintiffs tendered back to said defendant in legal tender money of the United States

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Lucas County.

the said sum of \$425 paid by it for said timber, and notified said defendant that they elected to rescind said contract on account of said fraud, and demanded of it that it surrender its said contract of sale and return to them the timber removed from said premises by virtue of said contract, or account to them for the value thereof; and that said defendant refused to accept said sum of \$425 and surrender its said contract and return said timber or account to plaintiffs for the value thereof.

“Wherefore, plaintiffs pray the court for a preliminary injunction enjoining and restraining the defendant from cutting or removing any more of said timber, and that on the final hearing hereof the said injunction may be made perpetual; that the said contract for the sale of said timber be declared to be void and of no effect, and for all other proper relief.”

Plaintiffs say that John G. Isham, in his lifetime, did not discover that this alleged fraud had been perpetrated; that is the only additional allegation of the amended petition, so far as we can discover, which seems to be very material.

Now the contention of counsel for the defendant is that the right to bring and prosecute this action is not in the devisees of this land; that if such fraud as is alleged was perpetrated so that a right of action arose, it is a right of action devolving upon the personal representatives of John G. Isham.

Plaintiffs, however, insist that it is a matter affecting the lands of which they are the owners, and that the right of action under this contract for the removal of the timber from these lands, which have been devised to them, survives to them, and that, because of their interest in the land, the taking of this timber from the land affects the value of the land, and that therefore they have a right, by injunction, to require that no more of the timber shall be removed; that the result thereof will be that the value of the land will not be diminished by the removal of any more of the timber they have succeeded to; that the value of the timber will remain, the standing timber, as part of the value of their property—part of their property. There is no averment in the petition or amended petition, I might say in passing, that the removal of this timber would affect the value of the land. For aught that appears, either by averment or proof, the value of the land would be increased by the re-

moval of the timber; that is to say, the clearing of the land would be worth more to it than the preservation of the timber standing. But that is a matter that might be changed or corrected by further averment and proof. The objection insisted upon goes to the very bottom of the matter; it strikes at the root. If plaintiffs can maintain any action at all, of any character, it must be on the ground of the alleged fraud.

Now it is evident that the right to sue can not be in both the devisees and personal representatives, they being different persons; that fact appears to have been recognized by the court of common pleas, and so the demurrer to the original petition on account of misjoinder of parties was sustained. Thereupon, as I have said, the personal representatives were dropped out of the case and these plaintiffs undertook to prosecute it. In our judgment the court below was right in sustaining this demurrer on account of misjoinder. But the parties made a mistake in dropping out the personal representatives and retaining the devisees under this will, instead of dropping out the devisees and retaining the personal representatives. If such fraud as is here averred was perpetrated, it was a fraud upon John G. Isham, and it resulted in a cause of action in favor of John G. Isham to recover damages on account of the fraud; and, no doubt also, a cause of action, if he chose to pursue it, to obtain a rescission of the contract. On the other hand, even though the fraud may have been perpetrated, and John G. Isham may have discovered it, it was within his power and his right to waive it and still insist upon the performance of the contract. But as I have said, this amended petition contains the averment that John G. Isham in his lifetime did not discover the fraud. Upon that I may say, however, there is no evidence submitted, except perhaps the single circumstance that John G. Isham was an invalid from the time this contract was made up to the time of his death. Notwithstanding that, however, he may have discovered this fraud and may have waived it after he had discovered it. There is no evidence that he did not. But that is not important to the main question that we are considering, *i. e.*, whether a cause of action survives to the devisees.

Now these devisees, as we view the matter, stand in precisely the same relation to this contract that the grantees of John G. Isham, taking by deed of gift or with knowledge of this contract, would have stood. If timber were in fact standing, under this contract the purchaser thereof would have the right to remove it. Such grantees could not hold it. The devisees are not in a position to complain that enough was not paid for this timber; whether too little or too much was paid or promised for this timber is of no consequence to them.

They acquired no right to any part or share in the consideration paid or promised. Both that paid and that promised, or that due by virtue of the fact that there was deceit, and enough was not paid, wherefore the seller might be entitled to more, was due to the seller, and upon his decease became due to his personal representative, not to the devisees; they were bound to take this land, as I have said, without the timber, and it was a matter of no consequence whatever to them whether half the price of the timber had been paid or promised, or double the price of the timber had been paid or promised. It is averred in the amended petition that they are heirs as well as devisees; but that does not change their standing as plaintiffs here; their standing as heirs would be the same.

The right under this contract to have compensation for the timber, either the compensation promised or further compensation or damages by reason of fraud, was a personal right. It was a chose in action which went, under the law, to the personal representative of John G. Isham. It was the right, as I have said, of John G. Isham in his lifetime to waive the fraud and insist upon the performance of the contract. The same right survived to the administrator. We may suppose that the administrator is content with this contract. We may suppose that he is content to keep this \$425, and allow the timber to be taken. What right have the devisees to object to that? What right have they to insist that instead of \$425 the personal representative shall have \$850, or some other sum; or that he shall have the timber? Clearly the timber can not go to the devisees. Under the doctrine of equitable conversion, if the devisees should prevail in this case, the timber would not go to them; it would

go to the personal representative. Upon that doctrine I may make some further comment and cite some authorities farther on. We may suppose a situation of this kind—a promise to pay for this timber in installments as it is taken, say one-half down and one-half at another time; part of the timber has been taken during the lifetime of John G. Iaham; part of it is now due to be taken and paid for; the administrator or personal representative is content that the timber shall be taken and the price paid; but the devisees stubbornly say, "No, there was a fraud perpetrated upon our devisor; he did not get, and therefore his personal estate has not received as much for this timber as ought to have been paid for it; therefore we shall object." We conceive it is not within the power; it is not the right of the devisees to make this objection; that the personal representative has a right to insist that the contract shall be fulfilled; that the timber shall be taken and the price paid for it. The personal representative may not care to interfere. The same result would follow if the timber were to be taken and paid for at so much a thousand as removed. Various illustrations might be given to show the inconsistency of the position of these devisees here. It is made manifest by the attempt made by the devisees to place the purchaser in *statu quo*, so that the right to rescind might be perfected. The devisees undertook to restore to the purchaser by tendering the \$425 paid for this timber. If they have never received it, it is not theirs to restore. What they are attempting to do is to interfere here and pay \$425 of their own money to thereby effect this object. The \$425 received is personal property in the hands of the personal representative. It is not the personal representative who is here seeking to place the purchaser of the timber in *statu quo* by surrendering the same, but those who, we conceive, have no right in this contract.

Suppose a situation of this kind—that the purchaser were complaining that he had not received as much timber as he had contracted for; that a fraud had been perpetrated upon him; against whom would he bring his action? Can he bring it against these devisees? Clearly not. If a cause of action survives to the purchaser of the timber as against the estate, it would survive against the personal representative as a personal

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obligation. There were no contractual relations between the purchaser of the timber and these devisees; no contractual obligations, and it is clearly manifest that if an action on the one hand must be made by the purchaser against the personal representative, the action on the other hand must be by the personal representative against the purchaser. We think a fair test of that proposition is found in the fact that if the plaintiffs here should prevail, that would not bar the right of action of the personal representative to sue for damages on account of this alleged fraud. In other words, the devisees, claiming under this will, by beginning an action of this character, even though they may have begun it first, even though they may have been forehanded in the matter, can not deprive the personal representative of the chose in action or of his right to recover damages on account of the fraud perpetrated upon the decedent. And we think the right to rescind is necessarily in the party having a beneficial interest adverse to the interests of the purchaser of the timber; the party therefore who may waive the fraud; the party therefore who may prosecute an action for damages instead of an action for rescission.

It may be thought, and has been suggested, that if an action of rescission were prosecuted by the personal representative, and he should prevail, the benefit would result to the owners of this land, in that it would preserve this timber upon their land; that they would become the owners of the standing timber. We do not think this is so. By this contract there has been an equitable conversion of this timber into personal property, and if this contract should be rescinded, the right to the timber would be restored to the personal representative, and as between the personal representative and the devisees, the former would have a right to go upon this land and take this timber. If the personal representative should prosecute an action of this character, he would be prosecuting it for the benefit of the personal estate and not for the benefit of the devisees. Upon this doctrine of equitable conversion I will cite 1 Pomeroy, Eq. Jurisp., Sections 161 and 371, and 3 Pomeroy, Eq. Jurisp., Section 1159.

“The doctrine of ‘conversion’ is a particular application of the principle that equity regards as done what ought to be done.

The doctrine itself was thus stated by an eminent English equity judge in the leading case upon the subject: 'Nothing is better settled than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally.' "

Much more may it be said of property, like trees, which may be severed from the land and made personal property by a contract. We hold that, as between these parties, the trees would be and were converted into personal property, so that, if the purchaser of these trees should be deprived of them in consequence of fraud in the contract, they would remain personal property as between the personal representative of the estate and the devisees under the will.

I read from 1 Pomeroy, Eq. Jurisp., Section 371:

"One of the most direct and evident results of the principle is the equitable property which arises from the doctrine of conversion—when real estate is treated by equity as personal property, or personal estate as real property; land as money, or money as land—'nothing is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, or whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money or money land.' A conversion may thus take place where, by a will, a deed or family settlement, land is actually assigned to the trustees, with directions in the one case to sell the land and pay over the proceeds to the beneficiary, and in the other to invest the fund in the purchase of the land to be then conveyed to him; or it may, in like manner, take place where, by marriage articles

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or other executory agreement, land is covenanted to be conveyed, or money is covenanted to be assigned, in like manner and for like purposes. The effect of the conversion is a direct consequence of the principle in question. Personal estate becomes, to all intents and purposes, in the view of equity, real, and real estate personal. Money directed to be invested in land descends to the heir of the original beneficiary or passes under a general description of real property in his will, while land directed to be converted into money goes to his personal representatives, or is included in a residuary bequest of his 'personal property.' These are some of the incidents of a conversion, and are sufficient at present to illustrate its nature and results."

There is considerable more in this work on this subject and a good many cases cited. Of course this is not a point we are called upon to decide here, but we mention it and discuss it as an illustration of the situation of the parties.

Now, in support of the contention on behalf of the plaintiffs that the right survives to the devisees, we are cited to certain authorities; but they consist of cases where the question arose as to whether the right to set aside a conveyance of the land had survived to the devisees; the questions were not so much as to who could enforce the right of action, as whether it actually survived; and it was decided in those cases that it not only survived, in equity at least, but that it survived to the devisees. But those cases we regard as very different from the case at bar. There the whole equitable interest of the deviser in the land was devised; there was no equitable conversion; there could have been no question as to the right of the personal representative. The land being recovered in a case of that character, would necessarily be the land of the devisees or the heirs, as the case might be. I cite a case somewhat in point, decided not a great while ago by Judge Wildman of the Common Pleas Court of Huron County, Ohio. It is the case of *Stang v. Newberger*, 6 N. P., 60:

"The plaintiffs allege substantially that they are the sole beneficiaries under the will of Peter A. Stang, who died in June, 1895, seized in fee simple of certain realty described; that during the lifetime of said decedent he had contracted with Magdalena Newberger, one of the defendants, to convey to her said

realty for \$2,785, payable in installments as evidenced by certain promissory notes; and that said vendee had paid to said decedent something over \$160, and defaulted as to the residue of the purchase price, as well as to certain other stipulations."

Now the plaintiffs undertook to tender back the notes and so much of the purchase price as had been paid, and sought to set aside and rescind the contract, and recover possession of the premises. A demurrer to the petition was sustained on the ground that the right of action was in the personal representative; there are other questions discussed in the case, but I will read from the opinion upon this particular question. The court says on page 63:

"The plaintiffs sue upon the presumption that they own the land and have a right to remove clouds from their title. But have they any other than a naked legal title, as trustees for the equitable owners?

"I find no lack of uniformity in the expressions of the courts and text-writers that in this class of cases the doctrine of equitable conversion applies and governs the descent of the estate. By this phrase is meant that doctrine or legal fiction under which, for some purposes, land is deemed personalty and personalty land. Thus, as stated in 8 Sugden, Vendors (8th Am. Ed.) n. 188:

"When an estate is contracted to be sold, it is in equity considered as converted into personalty from the time of the contract," etc.

"This language received the approval of Judge Johnson, in *Gilbert v. Port*, 28 Ohio St., 276, 298, 299, who says, after quoting Mr. Sugden's words:

"The learned author is discussing the effect of a devise of real estate on lands contracted to be sold and not conveyed."

"The doctrine finds further recognition and approval in *Smith v. Lowenstein*, 50 Ohio St., 346, 357, to which I refer without quoting.

"A more elaborate elucidation of equitable conversion may be found in Pomeroy's admirable work on Equitable Jurisprudence. See especially Vol. 1, Sections 105, 368, and note on page 403; and Vol. 3, Section 1261. It is distinctly asserted by the author that the vendor's interest in the contract to sell real estate is personal, and upon his death will descend, not to his heirs or devisees, but to his personal representatives. It is clearly indicated also that in case of payment of purchase

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money by the vendee to such heirs or devisees, the money belongs and should be paid to the personal representative.

"Mr. Sugden (Vendors & Purchasers [9th Ed.] n., star paging 172) says the same:

"If the vendor die before payment of the purchase money, it will go to his executors, and form part of his assets."

"Assuming this doctrine, which seems well settled, to be correct, does it leave any right in the devisees to a rescission of the contract? At the best they would seem to have received from their ancestors only a naked, legal title to land, while all other rights and interests of Peter A. Stang under the contract descended to the representatives of his personal estate.

"Under proper circumstances a right of election to rescind or affirm a land contract for default of the vendee resides in the vendor. He may elect to sue for the purchase money or endeavor to reclaim the land. At his death this right of election is entirely extinguished or descends to either his personal representative or to his heirs or devisees. It is inconceivable that it can take both directions. If, as asserted by Mr. Pomeroy and Mr. Sugden, and recognized by our own Supreme Court, the estate of the vendor in the land became personalty by conversion, then as such it descended, and the right of election to affirm or disaffirm the contract descended with it. The executor or administrator acquired the right of the vendor to sue for the unpaid purchase money, or at his election to rescind the sale and recover the land. The land, when so recovered by the personal representative, would logically be treated as personalty in the distribution of the decedent's estate. To hold otherwise and permit the devisees to rescind the sale would either rob the personal estate of one of its assets, its chose in action for the unpaid purchase money, or subject the vendee both to the loss of the land and to a possible judgment on the notes in favor of the executor or administrator, an inequity which, of course, is not to be thought of."

We have no question but this cause of action survived, but in our judgment it is clear that it survived to the personal representative and not to the devisees. Therefore the demurrer to the amended petition will be sustained. The petition will be dismissed, and there will be judgment entered against the plaintiffs for costs.

Ashton H. Coldham and Wilber A. Owen, for plaintiffs.

J. J. Moore, for defendant.

TAXES LEVIED UNDER A SPECIAL STATUTE.

[Circuit Court of Franklin County.]

ELLIS O. JONES, A TAX-PAYER, ETC., v. THE BOARD OF COUNTY COMMISSIONERS, FRANKLIN COUNTY, OHIO, ET AL.

Decided, November 23, 1903.

Taxation—Levies for County and Bridge Purposes under Section 2823—Reduction of other Levies—Section 2823a not Repealed by Mistake.

1. Whether Section 2823a, relating to the levying of taxes for certain purposes, and applicable to Franklin county, was inconsistent with the provisions of the Municipal Code of 1902 is a matter of opinion, and one as to which members of the Legislature may have held different views, but that, after consideration, a conclusion to repeal this section was reached, there seems to be no reason to doubt, and hence it can not be said that its repeal was through inadvertance or mistake.
2. Section 2823a having been repealed, the commissioners of Franklin county were limited in the making of tax levies in the year 1903 for county and bridge purposes to the authority found in Section 2823.

SULLIVAN, J.; SUMMERS, J., and WILSON, J., concur.

Heard on appeal.

Omitting the averments of the petition setting forth the official capacity of the several defendants and proceeding at once to state the substance of the several averments upon which plaintiff claims the relief he prays for, upon behalf of himself and other tax-payers of Franklin county, Ohio, which are as follows:

First, that the population of Franklin county on the 3d of June, 1903, was 164,000.

That the tax valuation of all property of said county was more than \$80,000,000, and less than \$100,000,000, being about \$90,000,000.

That said county commissioners on said date made a tax levy of 5 mills and 85 hundredths on the taxable value of all property in Franklin county, by the adoption of a resolution by said

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board, one-half of the tax to be paid December 20th, 1903, and the last half June 20th, 1904, and in which was included levies for the following purposes:

- 1st. Two and four-tenths mills, county purposes.
- 2d. One and four-tenths mills, bridge fund.
- 3d. One and forty-five one-hundredths mills, payment of bonds and interest.

That the foregoing, together with other levies for the various purposes designated in the resolution, made the total 5 85-100 mills upon all the taxable property of Franklin county, for the fiscal year of 1903. No other levies were made for said year.

It is averred that the defendant county auditor is preparing a tax duplicate for Franklin county, and that he will make up a complete list of all taxable property in said county in the form of a tax duplicate, and under said resolution levy upon all such property said 5 85-100 mills, and will determine the amount of taxes which may be assessed and levied against each dollar of valuation of such taxable property including plaintiff's, thereby casting a cloud upon the title to all of said taxable property, and when complete will deliver said duplicate to the defendant county treasurer for collection, who will proceed to collect the same. Whereby the plaintiff and all other tax-payers of said county will suffer an irreparable injury.

It is averred that said levy was made under Section 2823a of the Revised Statutes of Ohio. That said levy is illegal, unconstitutional, fraudulent and void, for the following reasons:

1st. Because the section under which said levy was made was repealed by the General Assembly of Ohio on October 22d, 1902.

2d. That said section was a special act relating alone to Franklin county, and hence in contravention of Section 26, Article II; Section 1, Article XV; Section 5, Article X; Section 5, Article XII of the Constitution of the state, because said act conferred corporate power, and the subject of taxation is of a general nature, and said section is not legislative, but judicial and administrative; that the several items of said levy hereinbefore set forth exceed the authority of the statutes in force at the time the same was made, no emergency existing at the time.

Plaintiff therefore prays that said auditor be enjoined from making the duplicate as above described and delivering same to the county treasurer, and the latter be enjoined from collecting said illegal levy, or so much thereof as may be in excess of the power of the county commissioners to make; that said excessive levies may be declared to be illegal, and void, and for such other and further relief that plaintiff and other tax-payers upon the facts shown may be entitled to; and upon the final hearing that said injunction to the extent of said excess might be made perpetual.

The petition in effect assails the entire levy, but as counsel for plaintiff in argument insisted upon such relief as might be granted should it relate only to and affect the three several items above stated, they have alone been considered. To this petition a general demurrer is filed. Counsel for defendant concede that no levy can be made by the commissioners not authorized by express statute, so that the inquiry is whether the statutes in force at the time the levy was made authorized the amount of levies made for the several purposes above mentioned.

In support of the demurrer, counsel for defendants insist that 2823a, under which said levies were made, is not repealed by the act of October 22d, 1902, though it appears among the repealed sections, for that it is manifest from the title of the act of October, 1902, that its appearance in the list of repealed statutes is a mistake. The title of the act of October 22d, 1902, reads as follows:

“An act to provide for a reorganization of cities and incorporated villages, and restrict their power of taxation, borrowing money, contracting debts and loaning their credit, so as to prevent an abuse of said powers as required by the Constitution of Ohio, and to repeal all statutes inconsistent herewith.”

There are 231 sections contained in the act, each section representing a different subject in municipal affairs, and counsel for defendants contend that Section 2823a neither relates to or affects any affair pertaining to municipalities, and therefore is not inconsistent with any of the provisions of the act of October 22, 1902, and hence furnishes an additional fact in support of their claim, that the repeal of 2823a was a mistake; that Sec-

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tion 2823a bore no relation to the conditions, which the General Assembly ought to relieve, but related solely to the power of County Commissioners of Franklin County to levy a tax and apportion the same, and therefore is not inconsistent with any provision of October 22d, 1902. Hence it can not be said it was included in the title to the latter act.

We have had a judicial construction of Section 16, Article II, of the Constitution, which provides "that no bill shall contain more than one subject, which shall be clearly expressed in the title." It is only necessary to call attention to one case as that fully amplifies the judicial construction given the section and the recognized reason for such construction. *Ohio, ex rel Atty.-Genl., v. Covington et al*, 29 O. St., 102:

"The requirement of the section is not mandatory, but directory—this construction is a rule of decision and based upon grounds of expediency. It is amply recognized by all courts of law and the reason of the rule is that less injury results by disregarding than by enforcing the letter of the law."

So that if Section 2823a was not inconsistent with any of the provisions of the act of October 22d, 1902, the fact that the intention to repeal it was not expressed in the title of the bill could not be considered as supporting the claim that its repeal was a mistake. The power of the legislative body to repeal an act must be conceded, though no reason be assigned for the repeal, or if one is given, and it appears wholly insufficient, the repeal is still just as effective. We think therefore, though said section may not fall within the class of those inconsistent with the act of October 22d, 1902, yet that fact could not be sufficient to supply the requirement of the rule observed by courts in correcting mistakes in statutes, which is as follows:

"The claimed * * * errors must be manifest beyond doubt, either on the face of the act, or when read in connection with other statutes, *in pari materia*," (*State, ex rel, v. Archibald*, 52 Ohio State, p. 9).

Section 2823a is repealed by reciting the full substance of the section, which alone would seem a sufficient answer to defendants' claim that its repeal was a mistake, and a sufficient reason

for the court declining to consider the question, whether the act was not inconsistent with any of the provisions of the act of October 22d, 1902. But can it be said that it is not inconsistent?

Under Section 860, of the Revised Statutes, the city of Columbus is not entitled to demand any part of the bridge fund levied by the county commissioners arising from the levy upon the taxable property of the city. Section 7, paragraph 18 of the act of October 22d, 1902, confers power upon council to control, *improve*, keep in order and *repair*, streets, bridges, etc., within the municipality, and Section 28 provides that council shall have the care, supervision and control of public highways, bridges within the city, and shall keep them in repair; and Section 9 authorizes a levy for such purposes. It would seem from these several sections of the code that repair of bridges and public roads and perhaps construction of same, within the city limits and raising funds for such purposes, was to be transferred to the municipality, and if so, to this extent at least, 2823a would be inconsistent with the provisions of the code cited.

Paragraph 18 of Section 7 of the code expresses no distinction as to bridges already constructed and those constructed after the code went into effect, so that it would seem that the entire burden at least of keeping such structures in repair within municipalities would rest alone upon them. Whether 2823a is inconsistent with any of the provisions of the code would be a matter of judgment alone and a question upon which perhaps there might appear strong reasons for a difference of opinion between members of the legislative body, but that a conclusion to repeal it was reached after a consideration of the section there seems no reason for doubt, and hence the repeal was not through inadvertence or mistake.

This brings us then to the next question. If 2823a was repealed, what, if any, authority did the commissioners then have to levy a tax for the several purposes contained in the resolution of June 3d, 1903? Section 2823a and the amendment thereto of April, 1902, was a supplementary act to 2823, and it provided that no levies specifically authorized by statutes should be included within the limits fixed in the supplementary act, and therefore it did not repeal 2823. By the latter section they are

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authorized to levy for county purposes seven-tenths of a mill, and for bridges, under 2824, five-tenths of a mill, and Section 2823 provides that whenever in any county the levy provided for in the first section of 2823 is deemed insufficient for general county purposes the commissioners may increase said levy by any amount not exceeding six-tenths of a mill on the dollar valuation, but in such cases the levies for other purposes shall be reduced to the same extent, or that the total levies for all purposes shall not exceed the limits provided in the title and chapter in which said sections appear. The limit for all purposes in the chapter is one and eight-tenths mills, except where it became necessary to levy an additional tax to repair or rebuild county infirmary buildings, children's home buildings, etc., that may have been destroyed by fire or other casualty, and then the amount raised should not exceed \$10,000.

The one and eight-tenths mills is divided as follows: County purposes, seven-tenths of a mill; infirmary purposes, six-tenths of a mill; bridge purposes, five-tenths of a mill.

Counsel for plaintiff contend that when the commissioners levy six-tenths of a mill provided for by Section 2823, because the levy of seven-tenths of a mill is insufficient for general county purposes, and made levies for any other purpose provided for by 2823 and 2824, that to the extent of six-tenths of a mill such levies must be reduced, and that the commissioners not having made any other levy under chapter 5 but for county general expense fund and bridge fund, therefore a reduction should be made in the bridge fund. We do not so understand these sections of the statute.

Under Section 2823, commissioners are authorized to levy for infirmary purposes six-tenths of a mill. They did not make such levy in this instance, and the levy for county purposes and the bridge fund and the six-tenths of a mill provided for in the concluding provision of Section 2823 did not exceed the amount of levy the commissioners were authorized to make. We understand that the purpose of the provision in Section 2823, providing for the reduction of other levies when seven-tenths of a mill for county purposes has been made and the commissioners should levy the six-tenths of a mill in addition, is to prevent

the county commissioners from exceeding the limit of the levy for all purposes provided for in Chapter 5. Therefore the commissioners were authorized to levy for county purposes one and three-tenths of a mill, and for bridge purposes five-tenths of a mill, to which rate these two several levies will be reduced.

Counsel for plaintiff contend that the levy of one and forty-five one-hundredths mills for the bond redemption fund will yield a sum largely in excess of that required to pay the maturing bonds and interest thereon maturing in the year 1904. He claims that the estimate made by the county commissioners, including interest and the amount of such bonds, is \$113,530, but that the levy made will yield a sum of over \$130,500.

The petition does not set forth the amount of the maturing bonds of 1904, and the accruing interest thereon; and as the questions presented here are on a general demurrer to the petition, and as to whether the amount claimed by plaintiff is correct, being a question of fact, the court in considering the general demurrer to the petition can not pass upon that question.

We are therefore of the opinion that the judgment of the court below upon the demurrer was correct, and the same judgment will be entered here at defendant's costs. In view of these conclusions, the claim that Section 2823a was unconstitutional becomes wholly immaterial and therefore unnecessary to be determined.

M. E. Thrailkill, for plaintiff.

Taylor, Seymour & Webber, for defendant.

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SUSPENSION OF RIGHT TO TAKE TOLLS.

[Circuit Court of Hamilton County.]

THE OHIO TURNPIKE COMPANY v. ERNEST WAECHTER; heard on error to the Court of Common Pleas of Hamilton County.

THE OHIO TURNPIKE COMPANY v. C. M. EDWARDS ET AL; heard on error to the Court of Common Pleas of Clermont County.

STATE, EX REL C. B. NICHOLS, v. JOHN D. MARTIN; quo warranto from Clermont County.

Decided, December 16, 1903.

Turnpikes—Suspension of Right to Take Toll Upon—Must Be by Due Process of Law—Impanelling of Jury—Without Express Authorization of Statute—Inherent to Jurisdiction—in Quo Warranto—Constitution Does Not Execute Itself.

1. A suspension of the right to take tolls under R. S. 3484 and 3485 is a taking of property no different in kind, only less in degree, than that defined in the case of *Turnpike Company v. Parks et al*, 50 O. S., 568, and as such can only be had by due process of law.
2. The Constitution does not execute itself, and where in a special proceeding a jury is necessary, provision should be made therefor by statute.
3. The right to impanel a jury to try issues of fact is inherent in the exercise of jurisdiction in quo warranto.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

These three cases growing out of the same property, the Ohio turnpike, and presenting substantially the same questions, will be considered together.

The first two, error cases, were begun in magistrates' courts and were prosecuted under R. S. 3484 and 3485. In both cases it was contended that a suspension of the right to take tolls was a taking of private property, and under the case of *Turnpike Company v. Parks et al*, 50 O. S., 568, was in violation of:

"1. Section 5, Article 1 of the Constitution: 'The right of trial by jury shall be inviolate.'

"2. Section 16, Article 1 of the Constitution: 'Every person, for an injury done him in his land and goods, shall have remedy by due course of law.'

“3. The provision of Section 1, Article 14 of the amendments of the Constitution of the United States, that no person shall be deprived of property without due process of law.”

In the Edwards case in the Common Pleas Court of Clermont County, the court offered to impanel a jury to try the issues of fact as to the condition of the road, etc., but counsel for the turnpike company, while contending that said company could not be deprived of its property without due course of law, that is, without the intervention of a jury, nevertheless denied the power of the court to impanel such jury without express authorization by statute so to do.

Dickman, J., in the Parks case, *supra*, said:

“The right to take toll upon a turnpike is a franchise, and when properly exercised becomes a useful and valuable right—a source of income and the means of reimbursing the company for keeping the road in repair for safe and convenient use. And this franchise, which in the case at bar it is sought to extinguish, is to be regarded as property in the enlarged sense of the term.

“A franchise is property, and nothing more; it is incorporeal property, and it is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment.” Daniel, J., in *West River Bridge Company v. Dix*, 6 How. (U. S.), 507, 534, cited in the Parks case, *supra*.

We are of opinion that a suspension of the right to take tolls is a taking of property no different in kind, only less in degree.

There are two contentions on behalf of the plaintiff below:

First. That this is not an absolute taking of property but a sequestration of the same to enforce the court's order as to repairs, in analogy to a mesne process from a court of chancery. The answer to this is that this is not an equitable proceeding because it is begun, and, in default of appeal, may be ended in the court of a justice of the peace who has no equitable jurisdiction. In a proceeding at law, then, property can only be taken by due course of law.

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Second. That an appeal is provided by R. S. 3485 to the court of common pleas, and that a jury may be had in that court. In the Waechter case this was denied by the court below.

If we find that this proceeding is the taking of property and can only be had under the Constitution by the intervention of a jury, as the Constitution does not provide for the impanneling of a jury and as the Constitution does not execute itself, we must look to the statutes to find what provision, if any, is made for a jury in such proceeding. The provisions for the impanneling of a jury by the common pleas court in criminal cases can not apply. R. S. 7267-7275-7276, etc. Neither can the general provision of R. S. 5130 in civil actions apply.

“Issues at law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, or specific, real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided.” R. S. 5130.

Now we find that the jury on appeal in road cases is specially provided for in R. S. 4700 (which saves the constitutionality of action by viewers). We find further that in all special proceedings in which a jury is needed, special provision is made for the same by statute, viz., condemnation, bastardy, will contests, etc. In the absence of such provision we fail to see how the constitutional right of the turnpike company can be secured to it.

The same objection is urged by counsel for the turnpike company in the quo warranto case. In this case the taking of property sought is absolute, and unless the issues of fact can be determined by a jury impaneled by and under proper instructions from a court of competent jurisdiction, under the Parks case, must fail.

Jurisdiction in quo warranto is conferred by R. S. 6768. Where the constitutional right to a jury trial is recognized, the right to impanel a jury to try issues of fact is inherent in the exercise of jurisdiction in quo warranto (23 A. & E. Encyl. of Law, p. 626). It pertains to the jurisdiction conferred. If then in this case in this court a jury were demanded we would proceed to impanel one as provided in R. S. 5168. The constitu-

tional right being thus secured in this kind of an action in this court, the objections of the Parks case are avoided and this court in a proper case could forfeit defendant's franchise.

We are of opinion that when the individuals, defendants herein, took this property under the act of May 5, 1868 (65 O. L., 136), the same vested "in them in the same manner" as franchises vested in the original corporators and subject to the same visitation on the part of the state through its courts as obtained against the original corporation, and this action would lie either under R. S. 6760 against a person who unlawfully holds a franchise, or R. S. 6761 against a corporation when it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises, or when it has misused a franchise, privilege or right conferred upon it by law.

In quo warranto the court has the widest latitude of discretion in granting and withholding the writ in consideration of general justice, public and private, and can take into consideration all the conditions and even the protestations of what defendants purpose doing immediately.

In view of the changes which brought about the conditions complained of, the promise of defendants to make immediate repairs and restoration, the season of the year, etc., the court will give the defendants until April 1st, 1904, to repair the road to conform to the requirements of R. S. 3477—"at least sixteen feet (in width) shall be made an artificial road composed of stone, gravel, etc., well compacted together in such a manner as to secure a firm, even and substantial road"—and proceedings herein will be stayed until then.

We are of opinion that R. S. 3484 and 3485 do not afford what the Constitution vouchsafes, and the error cases will be reversed.

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INFORMALITIES IN THE LEVYING OF A STREET ASSESSMENT

[Circuit Court of Lucas County.]

HARRIET A. BLAIR v. C. K. CARY.

Decided, February 23, 1903.

Assessment for Street Improvement—Excess of Benefits Need Not be Determined—Irregularities in Council Proceedings—Method of Recording Yea and Nay Vote—If Assessment Just, Method of Fixing it Unimportant—Valuation of Property Not Necessary, When—Tax Sales—Valid Title Can Not be Obtained Where Any of the Tax Was Illegally Imposed.

1. An assessing committee of council having found and determined that the benefits accruing to all the property to be assessed on a street for a contemplated improvement is equal to the amount to be assessed thereon, it is not necessary to go further and determine the extent, if any, that the benefits will exceed the amount to be assessed; provided, that the amount to be assessed is equally apportioned and assessed, and that the assessment does not in the case of any particular lot exceed the benefits accruing thereto, nor its proportion of so much of the total benefits as equaled the total amount to be assessed.
2. When a just and equitable result has been obtained, and abutting lot owner will not be heard to complain because the method by which the result was reached was not scientific, or was informal, or even the result of an accident.
3. Although, in the opinion of the court, there is a better way of recording a yea and nay vote, yet where the record of the proceedings in council with reference to a street improvement resolution sets forth the names of the members present, and that a vote was taken and the resolutions adopted, and the number voting corresponds with the number whose attendance is noted, the validity of the action can not be successfully questioned.
4. A failure to fix a valuation of the property to be assessed does not render an assessment invalid, in a case where no valuation was required under Section 2272, and two-thirds of the property owners on the street signed the petition for the improvement, including the plaintiff.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on appeal.

Suit was brought in the court below by Harriet A. Blair, who was the owner of lot No. 21 and the westerly thirty feet of lot

No. 22, in the Virginia street addition to the city of Toledo, to have her title quieted as against certain claims against said property which were asserted by the defendant, Cary. It appears that the property had been sold by the treasurer of Lucas county at a delinquent tax sale to Cary, for the sum of \$128.05, the same being the amount of taxes charged upon the tax duplicate of said county against the property for the year 1899; that in pursuance of this sale the auditor of the county issued and delivered to the defendant a certificate of purchase of said premises. It appears that a part of the taxes making up this amount were state, county and city taxes, for general purposes, for the year 1898, and a part of the amount was made up of fifteen per cent. penalty thereon, and part was state, county and city taxes for general purposes for the year 1899; and on account of an assessment for the paving of Virginia street, \$73.40, and on account of an assessment for printing notices, \$3.40.

Now it is averred in the petition—and this is not disputed—that a part of this general tax was levied because of a debt of the county arising out of the building of an armory in pursuance of “an act to provide for acquiring land and building an armory in the county of Lucas, for the use of the Ohio National Guard, and to create a fund to pay for the same” (87 O. L., 598). It also appears that that act has been held to be unconstitutional, and the levies to raise funds to discharge this debt have been held to be invalid; and in consequence thereof no valid title to property can be obtained at a tax sale where any of these taxes make up a part of the taxes on account of which the sale is made. So the defendant here does not undertake to claim title to the property, nor to enforce the collection of the penalty, nor to maintain his lien for the penalty. The contention in this case, therefore, is narrowed down to the assessment for the paving of Virginia street. It is contended on behalf of the plaintiff that this assessment is invalid—this assessment of \$73.40 due and payable in the year 1899, for various reasons set forth in her petition. There are other installments of this assessment on account of the improvement of Virginia street by paving, for the years 1900, 1901, 1902 and 1903, the total of the amount of this assessment upon this

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property being \$281.06. The defendant paid this item of \$73.40 at the time he made this purchase. It appears, I believe, that he has since paid one other installment, and he undertakes to maintain his lien for these parts of this assessment upon the Virginia street property. Now the plaintiff avers that this assessment is invalid, "is null and void, for the reason that said city council did not determine the value of the premises, or any part thereof, hereinbefore described, either in advance of said assessment or at the time of making the same." Also, "that said assessment for the improvement of Virginia street was, in the first instance, made by the assessing committee appointed by said city council, to make an assessment in proportion to the special benefits conferred by said improvement upon the lots and lands benefited thereby, in pursuance of a resolution therefor, but plaintiff says that neither said assessing committee nor said common council ever made a total valuation of the special benefits conferred by said improvement upon the lots and lands benefited by the same, as provided by law and by the resolution of said common council appointing said committee, for which reason said assessment is wholly null and void."

Counsel for plaintiff in error contends that because the assessing committee failed to ascertain and used as a basis for the apportionment of the assessment the total of the benefits accruing to the property on the street, the assessment can not, in the nature of things, be correctly apportioned. He quotes the provisions of Sections 2264 and 2277, Rev. Stat., relating thereto and cites the case of *Chamberlain v. Cleveland*, 34 Ohio St., 551, and urges that to meet the requirements of the statutes and the rules laid down in this case, the sum of the benefits must be ascertained and used as a basis in the mathematical problem necessarily involved and submitted to the city council and assessing committee for their solution. I quote from his brief:

"This proposition may be stated mathematically as follows:

The whole special benefits	are to	the special benefit of a particular lot	as	the whole amount to be assessed	is to	the assessment on the particular lot.
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"But it is alleged in paragraph seven of the petition that neither the assessing committee nor the council ever made a valuation of the whole special benefits conferred by the improvement (and this allegation is denied in the amended answer as interlined, but the testimony supports the petition). It therefore follows that as the first term in the above proportion was never determined it was mathematically impossible to determine the fourth term."

Now the report of the assessing committee is as follows:

"We find that the estimated value of special benefits conferred upon the lots and lands set forth in the ordinance providing for said improvement, passed August 9, 1897, is equal in amount to the total estimated cost of said improvement, including incidental expenses thereof as reported herein. We find and report an estimated assessment upon the lots and lands set forth in said improvement ordinance passed August 9, 1897, which estimated assessment so reported herein made on the lots and parcels of land so assessed and is apportioned among the several lots or parcels of land specially benefited by said improvement in proportion that the special benefit to each lot or parcel of land bears to the whole special benefits conferred by said improvement. Said estimated assessment upon each lot or parcel of land so assessed and as reported herein, is based upon the value of special benefits conferred upon the same by said improvement, and does not exceed the same nor do they exceed the proportion of special benefits conferred upon each lot or parcel of land by said improvement, and said assessment, so made as aforesaid, is as follows:

[Among the list of property described appears the following:
"Lot 21 and Wly 30 ft. lot 22 Virginia street Add (1899) \$73.40.
(1900) \$55.42, (1901) \$53.08, (1902) \$50.75, (1903) \$48.41, (total) \$281.06."]

"Respectfully submitted,

"A. E. FORSTER,

"GEO. VOGEL,

"JOHN G. KELLER,

"Committee.

"Toledo, O., August 25, 1898.

"Confirmed October 10, 1898.

"Attest: Lem P. Harris, *City Clerk*.

"Ordinance to confirm assessment, Vol. T. Journal, p. 294.

"Yea and nay vote duly recorded council meeting October 3, 1898."

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Keller and Forster, two of the assessing committee, testify orally as to the course they pursued in making the assessment. They agree in their statements, and it is agreed by council that Vogel, the third member of the committee, if called, would testify the same. They say, in substance, that they proceeded as follows:

1. They got the total cost of the improvement from the city civil engineer.

2. They obtained the descriptions of all the property to be assessed.

3. They ascertained the amount of benefits to each parcel and apportioned the same, having reference in so doing to the whole amount to be assessed. But they say that they ascertained and determined that the amount of benefits upon all the property to be assessed exceeded the total of the costs and expenses which they assessed thereon; that the amount of the assessment upon any parcel did not exceed in any case the benefits thereto nor its proportion of the amount assessed upon all the property. They also say that they determined the value of each lot so as not to exceed the limitation of twenty-five per cent., which they supposed they were required to observe—that is to say, that the assessment should not exceed twenty-five per cent. of the value of the property; that in estimating the benefits they viewed the property; they considered its location, the size and shape of each parcel, the extent of the frontage, the improvements thereon and the uses to which it was or might be devoted, and everything else that in their judgment had a proper and legitimate influence upon the estimate they were making of the benefits accruing thereto from the improvement, but they did not estimate the amount of benefits accruing to all the property upon the street and sum the same up or go through the arithmetical operation of adding the same and using the total as a basis for apportioning the benefits, and, finding that the benefits exceeded the amount to be assessed, they proceeded with that amount as a basis, taking no account of the excess of the total benefits over the total amount to be assessed.

Counsel for plaintiff in error relies very much upon the case of *Chamberlain v. Cleveland*, *supra*. We do not understand that

the court in that case attempted to lay down any certain rule, method, or *modus operandi* for apportioning such burdens or making such assessments, or that anything there held supports the contention of counsel that the total of the benefits accruing to all the property benefited and to be assessed must be ascertained and stated and used as a basis or as one of the terms of a mathematical problem to be worked out by the assessing committee or the council. The fundamental fault in the proceedings in that case manifest upon the record, was a failure to consider at all the question of benefits in making the assessments, and proceeding upon the assumption that the cost of the improvement was to be assessed upon the abutting property at all events.

In the case at bar the assessing committee having found and determined that the benefits accruing from the improvement to all the property upon the street to be assessed therefor was as much as the amount to be assessed thereon, we are of the opinion that it was not required to go farther and determine the extent, if any, that the benefits exceeded the amount to be assessed. In other words, if the total of the benefits to all the property exceeded the amount to be assessed, the amount of such excess was unimportant. It was only important that the amount to be assessed should be equitably apportioned and assessed, and that the assessment should not exceed, in the case of any particular lot, the benefits accruing thereto, nor its proportion of so much of the total benefits as equalled the whole amount to be assessed. This result they say they obtained. Whether they used it as the first term in the problem, as stated by counsel, the total of benefits to all the property, or only so much of the total benefits as they were required to apportion and assess, the result would be the same. In other words, if \$20,000 were found to be the total of the benefits, and \$15,000 the amount to be apportioned and assessed, it would follow that an amount equal to but seventy-five per cent. of the benefits accruing to each parcel should be assessed against the same. Proceeding to make the apportionment and assessment of the \$15,000, if they considered the just proportions, they *necessarily* assessed upon each parcel but seventy-five per cent. of the benefits accruing thereto.

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They report and they declare that they considered these elements of the problem, and that they obtained the results that in their judgment was right and just after giving full consideration and according full influence thereto; that they did not assess any parcel in excess of the benefit resulting thereto nor more than its just proportion of so much of the total benefits as equalled the amount to be assessed. This, as we understand it, is the substance of their report and testimony, and this we believe is a compliance with the spirit and the letter of the law.

But, even if this were not made to appear affirmatively, the plaintiff would not therefore be entitled to a decree against the enforcement of this assessment. In our judgment she must go farther than to show that the committee did not proceed by a certain or even by a prescribed method to attain the result. In order to entitle her to such relief at the hands of a court of equity she must make it appear that, in her case, a just and equitable result was not attained. Even though the method pursued by the committee, or the council, was not scientific, or was informal, if the amount assessed against their property did not exceed the benefits thereto resulting from the improvement, and did not exceed her just proportion of the benefits thereby resulting to all the property subject to assessment therefor, she has no ground of complaint.

Now it is admitted in the agreed statement upon which (as supplemented by oral evidence) the cause was submitted to us, that the whole amount assessed upon the property upon the street does not exceed the whole of the benefits thereto, and that the amount assessed against plaintiff's property does not exceed the benefits thereto; and she does not aver nor attempt to prove that the amount assessed against her property exceeds, or even equals its just proportion of the total benefits to all the property assessed; she simply avers that the committee or council never ascertained the total of benefits to all the property, and urges that because of this omission it was *mathematically* impossible for it to make a just distribution of the burdens.

Enough has been said to indicate our views upon that proposition; but, even if that were true, if a just result so far as

plaintiff is concerned had been attained by other than scientific methods, or even by accident, she is without ground of complaint, and it devolves upon her to show that her property has been over-assessed—that the law has been disregarded to her hurt and injury. In this she has totally failed; indeed, she has not attempted to make such a showing. We hold, therefore, that she is without just ground for complaint on this head.

The petition contains the averment that:

“Said contract was null and void for the reason that the resolution confirming it was not adopted by a yea and nay vote, nor were the yeas and nays on the adoption thereof entered upon the journal of said city council.”

Section 1693, Rev. Stat., requires that the vote on the adoption of ordinances, resolutions and by-laws “shall be taken by yeas and nays, and recorded on the journal,” and that the concurrence of a majority of all the qualified members of the legislative body shall be necessary to their adoption. The agreed statement of facts on that subject reads as follows:

“3. That there is recorded in volume K of resolutions, at page 213, the following:

“‘RESOLVED, By the common council of Toledo that the contract with F. E. Cole for the improvement of Virginia street, from Collingwood avenue to Lawrence avenue, by paving the central twenty feet thereof with Trinidad asphalt No. 1 laid on a foundation of concrete six inches thick to the established grade, and providing the necessary grading, curbing, drainage, etc., be and the same is hereby confirmed.

“‘Adopted October 11, 1897.

“‘Attest: Lem P. Harris,
“‘City Clerk.

Approved October 13, 1897.
S. M. JONES, Mayor.’

“4. That the only records of the passage of the resolution set out in paragraph three above is the following, recorded in volume F of the journal of board of aldermen, at page 305:

“‘A resolution to confirm contract for the improvement of Virginia street, Collingwood avenue to Lawrence avenue, by paving, adopted, yeas, fifteen.’

“And the following recorded in volume S of the journal of the board of councilmen, at page 470:

“‘A resolution to confirm contract for the improvement of Virginia street, Collingwood avenue to Lawrence avenue, by paving, adopted, yeas, twenty-nine.’

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"5. That the record of the meeting of the board of aldermen at which the resolution set out in paragraph four was passed shows that at the opening of said meeting the following members were present, to-wit: Bacon, Braunschweiger, Brown, Fellows, Jackson, Jefferson, Laden, Metz, Mathias, Roulet, Stewart, Sullivan, Valentine, Whalen and Meissner—fifteen.

"That the record of the meeting of the board of councilmen at which the resolution set out in paragraph four was passed shows that the opening of said meeting the following members were present, to-wit: Abele, Austin, Bretch, Calkins, Champion, Chase, Coleman, Connell, Dawson, Drane, Engelhart, Hales, Hoffman, James, King, Kraus, Masten, Roll, Reeves, Schneider, Schirks, Shovar, Stark, Truman, Wylie, and McAleese—twenty-seven; and that after said meeting was opened, and before said resolution was voted upon, the following members came in and took their seats, to-wit: VanLoo and Stevens."

It is urged that this does not show a compliance with the law, but that it discloses that the law was not complied with. In supporting this conclusion counsel cites *Steckert v. East Saginaw*, 22 Mich., 104. The statute there under consideration required that "the votes of all the members of the common council, in relation to any act, shall be entered at large on the minutes," and the record under consideration set forth the names of the councilmen attending, and that the resolution in question was "adopted unanimously on call."

In the case at bar it will be observed that the record says that certain yea and nay votes were taken, and the members are given, and the numbers correspond with the numbers of councilmen and aldermen in attendance, or whose attendance is noted. It is perhaps a fair inference, possibly a necessary conclusion, that all those named voted aye and that none other voted, or were present to vote. Nevertheless we do not mean to approve of the method of recording a yea and nay vote, and think that much that is said by Judge Cooley in his opinion in the case cited, is applicable to proceedings under our statute. He says, in part, page 107:

"Unless the minute is a compliance with the section of the charter in question, it is not claimed by the defendants that it has been complied with at all; but their argument is that the record shows, first, the names of the several aldermen who were

present when this action was had; second, that the roll was called on the vote; and, third, that each of them, when the roll was called, voted for the adoption of the resolutions. This being so, the vote is, in effect, entered at large on the minutes, and the repetition of the names of the aldermen in the minutes, when the precise position of each upon the resolutions submitted was already recorded, would have been only an idle ceremony, accomplishing no useful purpose.

"We have found ourselves unable to take the same view of this record that is taken by the counsel for defendants. There can be no doubt that the provision of the statute which requires these votes to be entered at large on the minutes, was designed to accomplish an important public purpose, and that it can not be regarded as immaterial, nor its observance be dispensed with (*Spangler v. Jacoby*, 14 Ill., 297; *Supervisors of Schuyler Co. v. People*, 25 Ill., 183). The purpose, among other things, is to make the members of the common council feel the responsibility of their action when these important measures are upon their passage, and to compel each member to bear his share in the responsibility by a record of his action, which should not afterwards be open to dispute. * * *

"What is designed by this statute is, to fix upon each member who takes part in the proceedings on these resolutions the precise share of responsibility which he ought to bear, and that by such an unequivocal record that he shall never be able to deny either his participation or the character of his vote. But manifestly we can not determine in the present case, with any certainty, that any one of the aldermen named—Alderman Buckhout, for example—actually voted for the resolutions in question. We know he was present when the council convened, but we have no record which points specifically to his individual action afterwards. Suppose he were to contest the tax as illegal, and the city authorities were to insist upon an equitable estoppel arising upon his vote in its favor, and he should deny such vote, we should look in vain in this record for anything absolutely inconsistent with such denial. Suppose his constituents, dissatisfied with this vote, undertake to call him to account for his participation, and he were to say to them, 'I was not present when these resolutions were adopted; I was indeed present when the council convened, but was called away soon after on private business'; this record plainly could not be relied upon to contradict his assertion. The persons arraigning him would be obliged, in order to fix his responsibility, to resort to the parol evidence of his associates or of by-standers. But the Legislature understood very well the unsatisfactory

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character of that kind of evidence, and they did not intend that the power to call an alderman to account for misconduct, delinquencies or errors of judgment in the performance of this official duty, should be left to depend upon it. They have imperatively required that there should be record evidence of a character that should not be open to contradiction, or subject to dispute; and their requirement can not be complied with according to its terms, nor satisfied in its spirit and purpose, without entries in the minutes showing who voted on each resolution embraced by the section quoted from the charter, and how the vote of each was cast. In other words, the ayes and noes on each resolution must be entered at large on the minutes, so that the presence or participation of any member shall not be left to conjecture or inference."

It does not appear that these councilmen did not in fact all vote "aye" upon this resolution; it is only charged, and it only appears that they are not recorded as having voted in that way. If they in fact so voted, the resolution would have been regularly adopted to all intents and purposes so far as it affected the rights of all parties who could possibly have any interest in it, even though the record did not affirmatively disclose the fact. As was decided in the case of *Drott v. Village of Riverside*, 4 C. C., 312, where a certain resolution embodying a contract did not appear to have been adopted at all, the fact that it was adopted might be shown by parol. Of course it would not be within the power of the city to defeat the rights of the contractors because of a failure of the recording clerk to make correct minutes of the transactions of the councilmen.

But, even if we should adopt the rule laid down in the Michigan case referred to, we can not see that the plaintiff may insist that a duty to her rested upon the city to deny payment under this contract, and that the city might have done so successfully and thereby relieved the plaintiff of the burden of the assessment; and it seems to us that this should be made to appear, in order to justify the contention of the plaintiff here that this assessment should be held invalid; that is to say, it should appear to us that the duty rested upon the city to declare that it had assumed no obligation and to refuse to pay anything to the contractor for furnishing material and labor for making the

improvement after it had stood by allowing these things to be furnished, and that the city could have successfully maintained that position, in order to allow the plaintiff to maintain her contention here under that head; and we are of the opinion that neither of these is true. We are not cited to any authority, and we have searched for none, but we do not believe that the city could stand by and allow this work to be done in pursuance of a contract and afterward successfully resist payment on the ground and because of an informality on the part of the council in adopting the contract, even if it were true that that informality existed, and we do not think it was a duty which rested upon the city to interpose such defense for the benefit of the plaintiff and others upon that street.

It is said, in the third place, that the assessment was invalid because the value of the property was never fixed by the council, so that no twenty-five per cent. limit could be observed, reference being had to Section 2270, Rev. Stat., which requires that an assessment shall not exceed twenty-five per cent. of the value of the property to be assessed. It does not appear to us that any valuation of the property was required in this case. It was held in the case of *Strauss v. Cincinnati*, 23 Bull., 359, by the superior court of that city, that a failure to fix a valuation did not render an assessment invalid in a case where it was required; and that holding was confirmed by the superior court at the general term, the report of the affirmance appearing in 24 Bull., 422; and if a valuation were required here, we would be inclined to the views expressed by the court in that case; but it seems to us that no valuation was required here (although the assessing committee say that they did consider the value of the property and were careful not to exceed the twenty-five per cent. limit), because of the express provision in Section 2272, Rev. Stat., applicable to this case. I read from the latter part of that section:

“Provided, that in cities of the third grade of the first class, when a petition has been regularly presented to the council, asking for the improvement of a street or alley, and the lot or land of one who subscribed said petition is assessed, said assessment shall be a valid lien against said lot or land for the

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full amount of said assessment, although it may exceed said twenty-five per centum of the value thereof."

Now it appears that this petition was not only signed by two-thirds of the property owners upon the street, but that it was signed by the plaintiff in error as well, and this language of the statute, it seems to us, is very clear and capable of but a single construction.

It is urged by counsel for plaintiff in error that the case of *Birdseye v. Village of Clyde*, 61 Ohio St., 27, is in point here and has some influence upon the construction of this provision of Section 2272, Rev. Stat., but we can not so understand it, and we do not think that is true. In that case the act under consideration was a special act for the city of Clyde, and it contained no limitation whatever; it did not contain a provision, as this section does, that the assessment should be a valid lien against the property, although it might exceed twenty-five per centum of the value; it contained no provision upon the subject.

Our construction of the law was that that being the only act invoked (the petition being under the act), and it containing no limitation, there was no limitation, and that, therefore, they might disregard the twenty-five per cent. limitation fixed in Section 2270, Rev. Stat. The Supreme Court, however, took a different view; it held that in the absence of any express provision, the limitation fixed by Section 2270, Rev. Stat., should be read into it and be considered as a part of the act, and that for the protection of persons proceeding under that special act as well as others. But here we have a case of an express provision applicable to the city of Toledo to the effect that notwithstanding an assessment may exceed twenty-five per cent. of the value, it shall be valid as against persons signing the petition; and we think, therefore, that the plaintiff has no ground of complaint upon that score.

We have tried to give this matter careful consideration, but we do not arrive at the conclusion which the court below seems to have reached in respect to this assessment. We see no ground for impeaching its validity, and we hold that it is valid; that

the plaintiff has a right to have her title quieted as against the penalty and as against the assessment on account of the bonds issued for the armory, but not as against this assessment. The judgment will be the same as in the court below, with the addition to the claim of the defendant of this assessment, and the costs in this court will be adjudged against the plaintiff, and the costs in the court below we think should be paid by the parties equally, i. e., each one-half thereof.

B. A. Hayes, for plaintiff.

P. S. Monnett and *N. O. Winter*, for defendant.

JUDGMENTS FOR TAXES BEAR INTEREST.

[Circuit Court of Lucas County.]

THE STATE OF OHIO, EX REL WILLIAM W. CRAPO, TRUSTEE, v.
PETER PARKER, AS TREASURER OF LUCAS COUNTY, OHIO.

Decided, July 3, 1903.

Interest—On a Judgment for Taxes Against Real Estate—Collectable Under Section 3181—Meaning of the Word "Transaction" as Used In This Statute.

A judgment in a suit brought for the recovery and enforcement of a lien for taxes against real estate bears interest from the time it was taken until it is paid.

HAYNES, J.; HULL, J., and PARKER, J., concur.

In this case a petition is filed for a writ of mandamus to compel the defendant, Peter Parker, Treasurer of Lucas County, to receive the amount of a certain judgment according to the amount stated in the judgment, and without any accruing interest upon the judgment—the real question being whether a judgment in a suit brought for the recovery and enforcement of a lien for taxes against real estate will bear interest from the time it was taken until its payment.

We have stated our doubts as to whether this is a case where the proper remedy is mandamus; but, waiving that, we have examined the question and come to some conclusions in regard to the case.

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It is claimed on behalf of the relator that the right to recover interest is founded upon Section 3181 of the Revised Statutes. Assuming that to be true, we have examined the statute, which is as follows:

“In cases other than those provided for in the two preceding sections, when money becomes due and payable upon any bond, bill, note, or other instrument of writing hereafter made upon any book account, or settlement hereafter made between parties, upon all verbal contracts hereafter entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of a contract hereafter made, or other transaction which hereafter occurs, the creditor shall be entitled to interest at the rate of six per cent. per annum, and no more.”

And a discussion is made upon the definition or proper understanding of the word “transaction.” It is claimed on the part of the relator that the levying of taxes and the collection of the same by judgment is not a “transaction” within the proper definition of the word, and that there being no statute which provides for the collection of interest upon taxes, or upon a judgment for taxes, that therefore no interest can be legally allowed. I have said—assuming that this statute governs, and I am of opinion that this does govern—at common law the matter of interest was entirely a question of damages, but it has come to be in this country a matter of contract, and very largely a matter of statutory right. Now this is not a bill, or a note, or any of these matters that are set forth in the different sections of the statute, and we think it is a proper statement to make that it must be included within the term “transaction.”

If we look at Anderson’s Dictionary of Law, at page 1047, under the heading “Transaction,” we find this definition to be given:

“Whatever may be done by one person which affects another’s rights, and out of which a cause of action may arise. It is broader than ‘contracts.’ A contract is a transaction, but a transaction is not necessarily a contract. In a statute, limiting counter-claims to demands arising out of the same transaction; some commercial or business negotiation; not a wrong of violence or fraud.”

That is, in relation to counter-claims growing out of the same transaction, and according to that it must be some commercial or business negotiation, not a wrong of violence or fraud. But, under this first definition: "Whatever may be done by one person which affects another's rights," the levying of a tax made by the supreme authority of the state, and by the officers of the state placed upon the duplicate, by the statute becomes a lien upon property. The statute states that the treasurer is authorized to bring suit, if taxes are not paid, and to force the lien to judgment and decree for the sale of the property, which would seem to come explicitly within the definition of "Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise."

Our ancient friend, Webster, has a definition also, at page 1402:

"The doing or performing of any business; management of any affair. That which is done; an affair, as, we are not to expect in history a minute detail of every *transaction*. (Civil law). An adjustment of a dispute between parties by mutual agreement. Synonym: proceeding; action; process. A *transaction* is something already done and completed; a proceeding is either something which is now going on, or if ended, is still contemplated with reference to its progress or successive stages. The *proceedings* at the trial of Lord Russell were marked by deep injustice, and they led to a *transaction*, in his beheading, of flagrant enormity."

It strikes us that the definition in regard to the proceedings upon the trial of Lord Russell and his execution, was a very fortunate illustration of the subject; that was a proceeding by one party which resulted in the decapitation of Lord Russell, and the other is a proceeding by one party which often results in the decapitation or taking in law of a man's property. At any rate it is a definition and illustration given by the dictionary—an act by one party which affected another and out of which an action might arise and judgment may be taken.

It was always supposed that every judgment drew interest. It was argued by counsel that it is usually stated in the decree that the judgment shall draw interest. Now our experience and our understanding is to the contrary. In an ordinary judg-

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ment or a decree taken for a specific amount, it has not been customary, so far as we know, to make a statement in regard to interest. The decree finding the amount due and declaring a lien upon the premises is a judgment, and the general terms and meaning of a judgment has been defined in the case of *Doyle v. West*, 60 O. S., 438.

I think it will be found that the definition of this word as claimed by counsel for the relator should prevail—that there are a large number of judgments which will not draw interest. As, for instance, judgments for torts, or for negligence, that do not arise out of any agreement between parties. In cases of assault and battery, libel, slander and all that class of cases, they are matters which are not consented to by the other party, nor have they arisen out of any agreement or arrangement between the parties, but they are acts of one party committed upon the other in violation of the rights of one party, which gives them a right of action, and that right of action is merged into a judgment, and that judgment should certainly be entitled to draw interest on the principles of equity and the true and proper construction of the statutes.

Without discussing the matter farther, we are very clearly of the opinion ourselves that this decree does draw interest from the time it was taken, and that has been the understanding of this court. The case referred to (*Wheeling & Lake Erie Railroad Co. v. Treasurer*, 15 Circuit Court Reports), we assume to be the law of this court. The point decided there was another point and followed a decision which was made by the court in the seventh circuit, in Belmont county, and was originally a question of penalties, and not a question of interest—except as the question of interest may have been drawn in prior to the time the decree was taken.

The petition of the plaintiff for a writ of mandamus will be dismissed.

W. H. A. Read, C. F. Watts, H. A. Merrill, for relator.

W. G. Ulery, for defendant.

**DECLARATIONS BY TESTATOR SUBSEQUENT TO EXECUTION
OF WILL.**

[Circuit Court of Hamilton County.]

ELIZABETH SCHMITT KUHL, EXECUTRIX, ET AL, V. MARGARETA
REICHERT ET AL.

Decided, December 16, 1903.

Wills—Declarations by Testator, Made Subsequent to the Will, Admissible as Evidence for the Purpose of—Charge of Court Capable of Being Misunderstood—But Interrogatories Answered Show it was Taken in Proper Sense.

1. Declarations as to testamentary intentions by a testator in advanced age and in feeble condition, made during last sickness and shortly after execution of will, are admissible to show the state of mind of the testator at the time the will was executed; and where, in answer to interrogatories, the jury find that the testator was not unduly influenced, and did not have at the time the will was executed sufficient mental capacity to make a will, a charge by the court that might have been interpreted by the jury to mean that such declarations were competent to prove an intention other than that expressed in the will, was not prejudicial, and the verdict will not be disturbed because of the error in the charge had it been so interpreted.

GIFEN, J., JELKE, J., and SWING, J., concur.

No exception was taken to the charge of the court, and hence any alleged error therein will not be considered, unless upon the whole record it appears that injustice has been done to the party complaining.

That part of the charge now objected to is as follows:

“Declarations made by the testatrix at, before, and after the making of the purported will as to her intentions in making the will are admissible to prove not undue influence, but capacity and intention, and should be considered in determining the state of the testatrix’s mind.”

If the court meant that such declarations were competent to prove an intention other than that expressed in the will, it was erroneous, because oral testimony is no more admissible to vary or contradict the terms of a written will than the terms of a contract in writing; but concerning the other proposition in the

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charge, to-wit, "Declarations made by the testatrix * * * should be considered in determining the state of the testatrix's mind," it is said in Paige on Wills, p. 474: "Any declarations of testator which tend to show the condition of his mind at the time that he made his will are admissible to determine his mental capacity at that date. So, statements made by testator relative to his intentions of disposing of his property are admissible, not for the purpose of contradicting the contents of his written will, but to show his state of mind at the time that he executed such will;" in support of which many cases are cited.

The strongest case cited by the plaintiffs in error in support of their contention that such declarations were inadmissible is *Crocker v. Chase*, 57 Vermont, 413, the first proposition of the syllabus being as follows:

"The declarations of a testatrix, made subsequently to the execution of the will, and at a time when she was of sound mind, are not admissible for the purpose of showing her mental condition when the will was executed. There is no logical relation between such declarations and the fact sought to be proved; although it is otherwise when mental unsoundness exists at the time the declarations are made."

The difficulty encountered in applying this case to the one before us, is that it is not clear that the testatrix, Philipina Schmitt, was, at the time the declarations were made, of sound mind. The particular declarations complained of and recited on pages 10 and 11 of the bill of exceptions were made at the time of her last sickness and shortly after the execution of the will. Her feeble condition by reason of her last sickness beginning a few weeks before the execution of the will, together with her advanced age, tended to corroborate the witnesses who were of the opinion that her mind was enfeebled.

We are of the opinion therefore that the declarations of the testatrix concerning her testamentary intentions were admissible to show the state of her mind at the time the will was executed, and if they were considered by the jury for any other purpose it was not prejudicial because the jury in answer to two special interrogatories found that the testatrix was not unduly influenced and did not have sufficient mental capacity to make a will at the time the will in question was executed.

The verdict of the jury was not so manifestly against the weight of the evidence as to require a reviewing court to set it aside.

The judgment will be affirmed.

Renner & Renner, contra.

Closs & Luebbert, for plaintiff in error.

MONEY DEPOSITED IN LIEU OF BAIL.

[Circuit Court of Lucas County.]

FRED B. BRUSOE V. THE RETREAT AND THE CITY OF TOLEDO.

Decided, October 3, 1903.

Arrest Without Warrant—Where there is No Evidence that the Accused was in Commission of the Crime Charged—Money Deposited in Lieu of Bail—Not "Voluntary" Where the Arrest was Illegal—And may be Recovered, Even though it has Passed to a Beneficiary.

1. Where money is deposited in lieu of bail demanded under an illegal arrest, the payment thus made is not voluntary, and may be recovered back.
2. Money thus deposited with police officials is held by the city as trustee, and where paid over by the city to a designated beneficiary, the beneficiary acquires no better title thereto than that of the trustee, and is bound upon demand of the one entitled to the fund to surrender it to him.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This action was brought by Brusoe in the court below against The Retreat and the City of Toledo, to recover back one hundred and sixty dollars which he had deposited in lieu of bail, in the police court of the city, and which money had been forfeited and withheld from him. It appears that on the 6th day of August, 1900, Mr. Brusoe and his wife, and some other women who were said to have been living at a place kept by himself and wife, were arrested by a police officer and taken to the police station on a charge of keeping a house of prostitution—that is to say, Brusoe and his wife were arrested on that charge, and the others were arrested on the charge of being inmates; and that they were arrested without affidavits having been pre-

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viously filed charging them with these offenses and without warrants having been issued and put into the hands of the officers for their arrest.

It is charged in the petition in the case that these moneys were wrongfully and unlawfully exacted from Brusoe, and such money unlawfully detained and delivered to The Retreat established in the city of Toledo for a home for friendless girls, which, under a certain statute of the state of Ohio, is authorized to receive all funds or forfeitures arising from the prosecution of houses of ill-fame or prostitution. It is not charged in the petition that the arrest was made without warrant, but the evidence in the case tends to show that that was true. Upon trial of the case in the court of common pleas a verdict was returned by the jury in favor of both defendants—both Toledo and The Retreat. On motion of plaintiff that verdict was set aside as to The Retreat, but it was allowed to stand as to the city. Error was not prosecuted to that order or to the judgment founded upon it in favor of the city, and the petition in error in this case was not filed within four months from the date of that judgment, so that the case against the city came to an end. Subsequently the case was re-tried as against The Retreat, and after the evidence was in on behalf of the plaintiff, a motion was made to rule the evidence from the jury and to enter judgment in favor of The Retreat. It does not appear from the bill of exceptions that this motion was acted upon, and witnesses were then called on behalf of the city, who gave some testimony, and thereupon the motion was renewed and the court ruled in favor of The Retreat, and directed the jury to return a verdict in favor of The Retreat, which was done; a motion for a new trial being made and overruled, judgment was entered, and now error is prosecuted here by Brusoe.

The testimony in the case tended to show that Brusoe and his wife were arrested without a warrant having been legally issued, no proper affidavit having been filed; it tends to show that the arrest occurred about 11:30 p. m. of August 6th, 1900. Mr. Brusoe testified that he was in custody not to exceed twenty minutes; that then the bail was fixed by some officer, in his case at \$100, and in his wife's case at \$100; they having previously

searched him and taken from him about \$117, or, as other witnesses say, \$122; that he desired them to retain \$100 of his money as the bail in his case, and as he was not able at the time to furnish bail in his wife's case, the \$100 was retained and the excess was returned to him. On the next day, the bail in his wife's case having been reduced to \$50, he produced \$50 and paid it over in lieu of entering into a bond, and thereupon his wife was released. The records introduced in the case tend to show, from their dates, that the affidavits charging these offenses upon Brusoe and his wife, were made out and signed upon the following day, to-wit, upon the 9th of August, and that the warrant was issued upon the 9th of August. The cases were continued by the police court for a few days to a time set for trial, and neither Brusoe nor his wife appearing to answer the charges, the bail was declared forfeited. The evidence tends to show that this money was paid to The Retreat in pursuance of the provisions of the statute which I have mentioned.

Now it is insisted on behalf of The Retreat that the evidence shows clearly that this money was voluntarily paid into the hands of the city officers in lieu of bail, and that, therefore, it can not be recovered back, and that, therefore, the direction of the court to the jury was right. And the testimony does tend to show, and perhaps it would not be out of place to say that as it stands it does show that Mr. Brusoe was not willing, under the circumstances, to deposit this money to obtain the freedom of himself and his wife; indeed that he was quite willing to do so. He did not tender a bail bond; there is nothing tending to show that he tendered such a bond, and that it was declined, and that the money was exacted in lieu thereof, but it tends to show that it was at the suggestion of Mr. Brusoe that the cash was taken in lieu of a bond.

Now that such an exaction of cash is illegal, and that it may not be retained by the city, is decided in the case of *Reinhard v. Columbus*, 49 O. S., 257. It is also decided in the case of *Columbus v. Dunnick*, 41 O. S., 602, that where one is arrested and at his own request makes a deposit of cash in lieu of bail, such deposit of cash, being voluntary, it may be retained and can not be recovered back. It appears, however, in that

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case that the arrest was lawful, that is to say, legal. In the case at bar, however, and in the case of *Reinhard v. Columbus*, *supra* (as held in the case), the arrests not being upon affidavit and warrant, were *prima facie* unlawful; and it is therein held that where an arrest is unlawful it can not be said that if cash or a bond is exacted, that the cash is "voluntarily" paid or the bond "voluntarily" given. The case of *Reinhard v. Columbus*, *supra*, seems to us to answer every legal question submitted to us in this case, and I read from the syllabus:

"1. It is illegal, unless authorized by statute, for a police officer or magistrate to receive money in lieu of bail for the appearance of a person accused of a criminal offense.

"2. A police officer arrested a person for an alleged misdemeanor under a state law before any charge had been preferred against him or warrant had been issued for his apprehension; and demanded from him, while under arrest, a deposit of money in lieu of bail for his appearance before the mayor, which deposit was made by the person arrested, to avoid imprisonment. The money was paid into the city treasury, and afterwards the city, by its promissory note, paid the same to the county; but while the money was in the hands of the city the party who was arrested demanded of the city that it pay over the same to him, which the city refused to do. In an action against the city by the party arrested, to recover the money, in which the legality of his arrest became a material issue, it was incumbent on the defendant to show that such a state of facts existed as justified the officer in making the arrest without the previous issue of a warrant, and that he did not detain the party arrested an unreasonable time before obtaining a legal warrant.

"3. Unless established by satisfactory evidence that the circumstances were such as to authorize the officer to make the arrest without the previous issue of a warrant, the payment of the money by the party arrested as a substitute for bail for his appearance, and to avoid imprisonment, is to be deemed an involuntary payment, and the sum so paid may be recovered by him in an action against the city, as money by it had and received for the use of the plaintiff."

The matter is fully discussed by Dickman, Judge, and in the course of his opinion a number of authorities are cited in support of the decision and of what is set forth in the syllabus.

In the case at bar there was no evidence submitted tending

to prove that the defendants in the police court—Brusoe and his wife—were in the commission of the crime charged, or were discovered by the officer in the commission of the crime charged, at the time he made the arrest without a warrant. Therefore, there being in the case at bar no testimony tending to show that there had been a legal arrest, and it appearing *prima facie* to have been an illegal arrest, the exaction of the money under such circumstances can not be said to have been a voluntary payment or delivery of the money. Precisely what the court below had in view, precisely what defect it found in the plaintiff's case, we are not advised.

It is argued that even though the plaintiff had a cause of action against the City of Toledo, he has none against The Retreat; that the money can not be followed into the hands of this institution. Now it appears that the money was not received by The Retreat in the ordinary course of business, as that phrase is used in law—it was not received for a consideration. The Retreat was the beneficiary; The Retreat received the money as a gift, a gratuity, and the court holding in this case of *Reinhard v. Columbus, supra*, that in a case of this kind the money can be recovered back as money had and received to the use of the person paying it, the city became substantially a trustee for the parties paying in the money, and was bound to hold the money for them, and one receiving these funds from the trustees without consideration, acquires no better title thereto than the trustee had, and is bound upon demand of the person entitled to the fund, to deliver it up, and, therefore, in our opinion, a *prima facie* case was made out against The Retreat, and the action of the court in taking the case from the jury was wrong and erroneous, and for that reason the judgment of the court below will be reversed and the case remanded for a new trial.

It may be that upon the first trial there was some testimony that convinced the jury that the arrest was legal, and that therefore the city was exonerated. Unless that were true, we can not understand why the city should have prevailed.

Peter Emslie and *A. C. Bowersox*, for plaintiff in error.

M. R. Brailey, City Solicitor, for defendants in error.

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ERROR PROCEEDINGS IN CONDEMNATION CASES.

[Circuit Court of Lucas County.]

THE STATE OF OHIO, EX REL HENRY KELLER, FRANK KELLER AND
ANDREW KELLER, JR., AS KELLER BROTHERS, v. RICHARD
WAITE, PROBATE JUDGE OF LUCAS COUNTY, OHIO. ..

Decided, October 10, 1903.

Appropriation—Proceedings in Probate Court—Final Order—Prosecution of Error Stays Execution of Judgment—What Damages the Bond Should Cover—Section 6434—Mandamus Will Not Lie to Compel Payment of Verdict.

1. An order of the probate court confirming a verdict in an action by a railroad company for the appropriation of land is a final order, to which error can be prosecuted without first paying the amount of the verdict into court. (Parallel cases—6 C. C., 362, and 6 C. C., 531).
2. The prosecution of error by the railroad company, and the giving of a sufficient bond, acts as a stay of execution of the judgment confirming the verdict, and the probate court can not be compelled by mandamus to require that the amount of the verdict, with interest and costs, be paid to the parties entitled to it, or deposited in court "within the time required by law."
3. The supersedeas bond required in such a case should be sufficiently broad to cover all the damages or loss that may result to the land owner by reason of the prosecution of error, including costs in the probate court, and expenses and attorneys' fees, in the event the railroad company should finally refuse to take the property; but it is not the office of a bond in such a case to protect the land owner against such loss, if any, as he may suffer from his inability to sell or encumber the land during the pendency of the error proceedings.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This is an action in mandamus brought to require Richard Waite, Probate Judge of Lucas County, by writ of mandamus, to make a certain order in an appropriation proceeding in the probate court of this county. The defendant refused, upon motion, to order the Toledo, St. Louis & Kansas City Railroad Company—known as "The Clover Leaf"—to pay into court the amount of a verdict, to-wit, \$8,411, awarded by a jury to the relators in this case, in a proceeding to condemn and appropri-

ate property for railroad purposes. The refusal of the judge to make this order is the basis of this action, and the petition asks that the judge be required to amend the journal of the court so as to allow said order instead of refusing it. The action came on for hearing before us on a petition applying for a writ of mandamus and a demurrer to the petition, the demurrer being made upon the ground that the petition does not state sufficient facts to warrant the issuing of a writ of mandamus. The question might have been raised without the filing of a demurrer, but simply upon the face of the application.

The facts briefly are that proceedings were commenced in the probate court to condemn and appropriate certain land belonging to the relators, and after the preliminary proceedings and the finding by the court that it was necessary to appropriate, a trial was had in due and proper form, and on the 13th day of August, 1903, a verdict was rendered by the jury for \$8,411. On the 25th of the same month a motion for a new trial, made by the railroad company, was overruled and the verdict was confirmed by the court according to the provisions of the statute, and a judgment entered. After that, on the 21st day of September, a petition in error was filed by the railroad company in the court of common pleas to reverse the judgment, and bond given to stay the execution of the judgment, under Section 6718 of the Revised Statutes. Within ten days after thirty days had expired from the time the judgment was confirmed, the motion to which I have referred was filed in the probate court, under Section 6434, Revised Statutes, and on the 30th of September the motion was heard by the court and overruled, the court refusing to order the railroad company to pay into court the amount of the verdict, on the ground that the railroad company had filed a petition in error in the court of common pleas to reverse this judgment, and had given an undertaking in the court of common pleas in said cause, under Section 6718, to stay execution in said cause. These reasons for the action of the court are set forth in the journal entry.

It is argued that the railroad company, by letting the time go by within which they are required by Section 6434, Revised Statutes, to pay the money into court—and instead of doing

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which they have prosecuted error in the common pleas court—should be regarded as having abandoned their rights in the premises to appropriate; that the probate court, under Section 6434, should have ordered the railroad company to pay this money into court notwithstanding the fact that it was prosecuting error in the court of common pleas and had given an undertaking there to stay execution.

It is contended by the relators that they should not be required to wait until error is prosecuted through the various courts by the railroad company; that they have a right to have the appropriation proceedings in the probate court ended, one way or the other—either to have their land taken and paid for, or the railroad company adjudged to have abandoned its rights, and required to pay the costs and expenses of litigation, including attorney's fees, as provided in Section 6434. It is urged that the pendency of these proceedings in the courts creates a cloud resting upon the title of this property that prevents the owner selling it and converting it into money, if they see fit, or encumbering it by mortgage or otherwise; that, in fact, their property is tied up and their right to sell or encumber it as their own private property is interfered with and taken from them during the pendency of these proceedings, and that for such interference they have received no compensation, and that in view of these facts they were entitled to the order which they asked of the court.

The Constitution of the state provides that private property shall not be taken for such a purpose as this unless compensation is first made in money or secured by the deposit of money. The various sections of the statutes relating to appropriation proceedings lay down the method in which the appropriation of property shall proceed, which are in accordance with the safeguards and provisions of the Constitution. It is claimed that a railroad company can not prosecute error from an order of the probate judge confirming a verdict—that it is not a final order; that error can not be prosecuted until the amount fixed by the jury has been paid into court. We hold, however, and it has been decided in this court, that the order of the probate court confirming a verdict is a final order to which error can be pros-

ecuted under Section 6708, Revised Statutes. That order is a judgment, and it is so called in the statute; it is a judgment to all intents and purposes, although it does not require the company to absolutely pay the money in; it has an option to pay it in, or abandon; but before it pays the money in it may prosecute error to the order of confirmance. This has been held by this court in a case decided at the January Term, 1892, and the question fully discussed by Judge Haynes, who delivered the opinion. The case is reported in the 6 Vol. Circuit Court Reports, page 521 (*Toledo, Ann Arbor & North Michigan Railway Co. v. The Toledo & Michigan Belt Railway Co.*). The syllabus is:

“A petition in error can not be prosecuted to reverse the finding and order of the probate court made upon the preliminary hearing in proceedings instituted and conducted under the provision of Section 6414 and 6453, Revised Statutes, relating to the appropriation of private property for public uses until after the verdict of the jury has been rendered, and judgment under Section 6432, confirming it, has been entered.”

And in another case found in the same volume, page 362 (*Toledo Consolidated St. Ry. Co. v. Toledo Electric St. Ry. Co.*)—two cases being heard together; it is so decided, also by this court, the opinion being delivered by Judge Scribner, and in which many other questions were discussed.

The sixth paragraph of the syllabus is as follows:

“Where, in appropriation proceedings, instituted and carried on in the probate court under the Revised Statutes (Sections 6414, 6453) a verdict fixing the amount of compensation to be paid has been rendered by the jury empanelled in the case, and an order or judgment of confirmation of such verdict entered by the court under Section 6432, proceedings in error may be prosecuted under Section 6708, by the defendant in the proceedings, to reverse such order or judgment of confirmation, before the compensation awarded by the jury has been paid, or the order provided for in Section 6433 made.”

This case went to the Supreme Court and was affirmed (*Toledo Consolidated St. Ry. Co. v. Toledo Electric St. Ry. Co.*, 50 Ohio St., 603). While this question was not discussed by the Supreme Court in the opinion, it was before the court, and if

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error could not have been prosecuted in the case the Supreme Court would have had no jurisdiction to hear it. The same holding was made in *Cincinnati, J. & M. Ry. Co. v. Barcalow*, 4 C. C. R., 49, the opinion being delivered by Judge Smith.

So that the railroad company is properly and lawfully prosecuting error to this order of the probate court confirming the verdict, without first paying in the money; and they have given an undertaking to stay execution under Section 6718, which provides that:

"No proceeding to reverse, vacate, or modify a judgment or final order rendered in the probate court, common pleas court or circuit court, except as provided in the fourth subdivision of this section, and in sections six thousand seven hundred and twenty and six thousand seven hundred and twenty-one, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order is made take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with sufficient surety as follows:

"1. When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that the plaintiff in error will pay the condemnation money and costs, if the judgment or final order be affirmed, in whole or in part."

Pursuant to this section the company has given an undertaking in the amount of \$17,000. Section 6437 of the chapter on the Appropriation of Property provides expressly for error proceedings in appropriation cases. It provides:

"Either party may file a petition in error in the court of common pleas of the proper county, within thirty days from the rendition of the final judgment in the probate court, and the proceedings in error shall be conducted as in civil actions; but the corporation may, on the rendition of the final judgment in the probate court, pay into said court the amount of the judgment for compensation and costs therein rendered, and proceed to enter upon and appropriate the property, notwithstanding the pendency of the proceedings in error."

The statute therefore provides that the corporation may, if it choose, pay into the probate court the amount of the judgment, notwithstanding the pendency of proceedings in er-

ror, and take possession. In this case it has not paid in, but has proceeded in error without so doing. Section 6438 provides that if the judgment is reversed in the court of common pleas the case shall be set down for trial in that court. The case does not go back to the probate court, but is tried in the court of common pleas *de novo*, except so far as the preliminary proceedings are concerned, which are not heard over again by the common pleas court, but the appropriation proceedings proper by way of determining the value, etc., are tried in the common pleas court before a jury the same as in the probate court; and there are various provisions as to costs. And it has been decided by the Supreme Court that the reversal by the common pleas court of the judgment of the probate court can not be reviewed by the circuit court or the Supreme Court on error, but the case must then be set down in the common pleas court for trial according to the provisions of this section.

So we find that there was a final judgment entered in this case; that proceedings in error are properly being prosecuted from that judgment, and the question is, whether, under this state of facts, the land owners had a right, under Section 6434, to require the railroad company to pay this amount of something over \$8,000 into court, or, failing to do that, that it be held to have abandoned its rights in the premises, and be required to pay the costs, including the attorney's fees, and lose its right to appropriate the property? This is the claim of the relators; and it is further claimed that in any event the bond which was filed in the court of common pleas is not sufficient to protect the relators in all of the damages that they may suffer on account of these proceedings in error.

Section 6434 provides:

"The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses, and attorney's fees, as found by the court. If the corporation fail in any case to make payment or deposit, as provided in the preceding section, within thirty days after confirmation of the verdict, the probate judge, on motion of the party entitled to such payment, to be filed within ten days after the expiration of said thirty days, shall enter an order directing the corporation to make such payment or deposit within thirty days after the

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date of such order; and unless such corporation, within said thirty days, make such payment or deposit, it shall be held and considered to have thereby abandoned the property, rights, or interests so appropriated and all claims thereon, under its proceeding, and the judge shall issue an order to that effect; the judge shall also enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent, and attorney's fees incurred by him in the proceeding, as the court, upon the evidence offered in that behalf, deems just and reasonable, for which execution may be issued against the corporation; and the directors of the corporation, individually, shall be liable upon such judgment, and may be made parties thereto by action."

In this case more than thirty days have expired from the time of the confirmation of the verdict. The relators filed a motion within ten days after the expiration of the thirty days, asking the court to enter an order directing the corporation to pay the money into court, or deposit it with the court within thirty days. This the court refused to do; and, there being no such order as that on the journal, it is urged that the relators had no right to make a motion, and that the court had no jurisdiction to entertain a motion to require them to pay the costs and attorney's fees. That motion and order is predicated upon the former one, which required them to pay the money into court, and they claim that they now have the right to have their attorney's fees and expenses. I will quote the exact language of the petition showing what we are asked to do in this case, which is found in the prayer of the petition:

"Wherefore, plaintiffs pray that the said defendant may be ordered and required to correct the journal of said court, and to enter thereon, as of the proper date, the order asked for in said motion, by said judge overruled on said 30th day of September, 1903, and for all other and proper relief."

And that motion was this:

"Now come the defendants Henry Keller, Frank Keller and Andrew Keller, Jr., and move the court to direct the plaintiff, The Toledo, St. Louis & Western Railroad Company, by order, in the manner provided by law, to make payment to the parties entitled thereto, or deposit with the probate judge the amount of the verdict in this action, to-wit, eight thousand four hundred

and eleven dollars, with interest and such costs as have lawfully accrued in the case up to the time of said payment, within the time allowed by law."

This exact question has never been passed upon by the Supreme Court, but there are several decisions of the Supreme Court bearing on different questions arising out of the appropriation of property and the rights of the parties and the powers and duties of the court.

It was held by the Supreme Court in *State v. Meiley*, 22 Ohio St., 534, that a probate judge could not be compelled by mandamus to pay the money over to the party entitled to it after it had been paid into his hands, for the reason that the probate judge was liable in an action personally upon his bond, and therefore that mandamus would not lie.

In *State v. Railway Co.*, 17 Ohio St., 103, the court held that where a railroad company had abandoned the proceeding after verdict it could not be compelled to pay the amount found to be the value of the land by the jury; the railroad company in that case having expressly abandoned the land, and, besides that, having constructed the railroad over another piece of land.

And in *Meily v. Zurmehly*, 23 Ohio St., 627, the court hold that when a railroad company takes land and takes possession of it, it must pay the money into court and the probate judge must pay the money over to the land owner, notwithstanding proceedings in error have been commenced by the railroad company. After stating the facts this is stated in the syllabus:

"*Held*: That it was the duty of the probate judge on the demand of the party in whose favor the judgment was rendered, to pay over to him the amount of such judgment, notwithstanding the pendency of the proceedings in error and the objection of the corporation; and his failure to do so is a breach of his official bond."

So that we find by this case, that if the probate court had required the Clover Leaf Road to pay this \$8,411 into court, that the land owners would have had the right to demand the money of the court and the court would have been compelled to pay it over to the land owners, and the railroad company would have had to take its chances on being able to recover back

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any of the money, in case the judgment should finally be reversed by a court of error on the ground that the judgment was excessive or that the court had proceeded according to some erroneous rule as to the measure of damages, or for any other reason. The moment the money is paid into the hands of the probate judge the land owner has a right to it and it is the duty of the judge to pay it over to him.

Wagner v. Railway Co., 38 Ohio St., 32, is an interesting case. In discussing some of the questions arising upon matters of this kind, the court say, on page 36:

"Something more than a verdict of the jury is required before the corporation can deposit the money and demand possession."

The question there was whether the railway company had a right to go into possession of the property before the verdict had been confirmed by the court, under Sections 6432, 6433.

Section 6432 provides:

"The jury shall render its verdict in writing, signed by the foreman, to the judge, who shall cause it to be entered of record; and unless for good cause shown, upon motion to be filed within ten days after verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict."

Section 6433 provides:

"Upon payment to the party entitled thereto or deposit with the probate judge, of the amount of the verdict, and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of, and shall hold the property, rights, or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition, and the judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof."

The court held in *Wagner v. Railway Co.*, *supra*, that the railroad company could not take possession of the property and proceed to convert it to its own use until the verdict had been confirmed by the court. They say, on page 36:

"The Constitution contemplates a judicial proceeding, in which the effect of the judgment is to divest the owner of the

title and possession of his property, and to invest both, to the extent of the condemnation, in the corporation. No right of possession is divested until the appropriation is complete."

It appears from the Constitution and these sections of the statutes as stated here by the Supreme Court, that a judicial proceeding is contemplated; that a jury shall be in the jury-box to pass upon questions of fact, and a judge on the bench to decide the questions of law, and the jury is charged and the trial proceeds in the ordinary way; and under the sections relating to error, the railroad company has the right, upon confirmation of the verdict by the court, to prosecute error, as in civil cases, to the court of common pleas. And in our judgment the prosecution of error and the giving of an undertaking, if one be given sufficiently broad to cover any damage that the land owner may sustain, acts as and causes a stay of the execution of the order and judgment of the probate court confirming the verdict of the jury. That judgment is in the nature of a judgment for money, but the railroad company is not required to pay it, for it may abandon its rights; but if the railroad company desires to take possession, as provided for by Section 6434, which has been read, the company is first required to pay the money into court for the benefit of the land owner. But it is of this judgment confirming the verdict that the railroad company complains. It complains in its motion for a new trial and in its petition in error, among other things, that the court permitted damages to be awarded to the land owners for personal property—for machinery, and perhaps some other property which were not fixtures—it complains of that ruling of the court; complains that the judgment is excessive, and to correct these errors which it claims occurred upon the trial, it filed its petition in error in the court of common pleas and gave its bond to stay execution. Now it would be of but little value in many cases to the railroad company to provide that it might prosecute error when such a judgment is entered, and at the same time to require that it immediately pay into court for the benefit of the land owner the amount of money that had been awarded by the jury. Error is prosecuted in such a case, not to settle some mooted question of law, something

in debate or dispute, but it is prosecuted in order that by the judgment of a reviewing court a less amount may be awarded to the land owner, upon the ground that errors have been committed by the court or jury and a larger amount has been awarded than should be to the owner, and the plaintiff in error seeks in such a case to reduce the amount that shall be awarded and paid; and to require the company, in order to retain its rights, to pay into court the amount of the judgment of which it is complaining notwithstanding a bond has been given, and to have it paid over to the land owner, we think would be very far from a proper construction of these statutes. Section 6434, providing for this order and the payment of the money into court, is to be construed in connection with the other sections of the statute providing for error proceedings; it is to be read in the light of those sections; it was the purpose of the Legislature to provide means for the railroad company to prosecute its case in error in the ordinary way, and to preserve its rights in the same manner that they might be preserved in a civil action. The statute says that error may be prosecuted from the judgment of the probate court as in civil actions. We are of the opinion, assuming that the bond was sufficient, that Judge Waite was right when he refused to enter the order asked in this case requiring the money to be paid in court, upon the ground that error was being prosecuted in the court of common pleas and that an undertaking had been given. We take only this exception to the proceedings—which may be cured—and that is, that the bond which was filed in the court of common pleas, in our judgment, is not broad enough to cover all of the damage or loss that might result to the land owner by reason of the prosecution of the proceedings in error, in that there is no provision in the bond securing the payment of the costs in the probate court and expenses and attorney's fees in that proceeding, in case the railroad company should finally abandon its rights to appropriate and refuse to take the property if the judgment should be affirmed in the higher courts. For the railroad company would still have the right, as provided in Section 6434, to abandon its rights in the probate court and refuse to take the property, and in that event it

would be required to pay the costs, expenses and attorney's fees which accrued in that court. There is nothing in this bond which was filed to cover such possible costs or expenses. The bond was perhaps large enough to cover any probable amount of costs and expenses that might accrue in addition to the judgment, it being for \$17,000—but we are of the opinion that an additional bond should be filed, under Section 6725, which provides:

“Execution of a judgment or final order, other than those enumerated in this chapter, of any judicial tribunal, or the levy or collection of any tax or assessment therein litigated, may be stayed on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof.”

It is our judgment that the court of common pleas, proceeding under this section, should prescribe the form of the bond and the amount, to secure these possible costs and expenses to which I have referred. It is plain here that the railroad company is prosecuting error in good faith and have undertaken to give a bond which would protect the land owner, and we take it for granted that a bond will be given in the court of common pleas in accordance with the suggestions made in this opinion; and when that is done, the petition may be amended setting that forth, or an answer may be filed setting that up, and the application for a writ of mandamus will then be denied and the petition dismissed. We think counsel should go to the court of common pleas and ask that court to fix the amount and prescribe and approve of the form of the bond as provided in Section 6725.

It is argued that there is no provision in the bond that has been given to protect relators, the land owners, against any damage they might suffer by reason of their inability to sell their land or encumber it by mortgage or otherwise during the pendency of these proceedings in error, and that therefore they are not fully protected. We are of the opinion and hold that they are not entitled to such a bond. Although these proceedings are pending, they still have the right to sell their property. It is not exactly a cloud upon the title, and whoever bought the property would take it subject to these proceedings, but a man who buys any property takes it subject to the right of

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a corporation to condemn it by appropriation proceedings. Relators' right to sell their property is not taken from them or their right to encumber it. If an action was brought to foreclose a mortgage upon property, and the mortgage had in fact been paid, such an action would be a cloud upon the title, but error proceedings might be prosecuted to a judgment, adjudging the mortgage paid and canceled, and such proceedings pending would interfere with the sale of the property as much as this proceeding, but the plaintiff in error would not be required to give a bond to protect the land owner from any damage that he might suffer on account of not being able to sell his property; he would still have the right to sell it or encumber it, and the purchaser would have to take his chances upon the pending litigation. We find no provision of the statute, nor do we think justice requires a bond to be given to cover such possible damage; if there is any damage of that kind, it would come within the rule of *damnum absque injuria*.

For the reasons stated, if this bond is given in the court of common pleas in the form suggested by the court, the application for a writ of mandamus will be denied and the petition dismissed.

[Said bond was given forthwith, and judgment entered against the plaintiff.]

James M. Brown, Frank G. Crane, for relators.

Clarence Brown, Charles A. Schmettan, for respondents.

CONTRACT TRANSFERRING RIGHTS UNDER A PATENT.

[Circuit Court of Summit County.]

CHARLES L. DOUGLASS ET AL V. J. B. CAMPBELL, RECEIVER.

Decided, December, 1902.

Patents—Assignment of, License for Use of, Grant of—Contract Conveying Interest in Patent—Word "License" Used in the Contract, But by Its Terms the Interest Conveyed Was an Assignment—Implied Terms of Contract.

1. Where a contract transferring a right or interest under a patent makes use of the word "license" in describing the interest transferred, but by the terms of the contract all interest in the patent was transferred, the contract will be construed as an "assignment" of the patent.
2. Parol evidence can not be used for the purpose of either reforming or construing such a contract.

CALDWELL, J.; HALE, J., and HULL, J., concur.

Heard on appeal.

The plaintiffs in this case, on March 15, 1894, were the owners of a certain patent pertaining to tubular steam boilers, and, on that day, as such owners, they entered into a contract with The J. C. McNeil Company, a corporation under the laws of Ohio, having its place of business at Akron, Ohio, which contract reads as follows:

"This memorandum of agreement made by and between the several owners in common of letters patent of the United States No. 478,690, dated July 12, 1892, issued to Herbert F. Cook, assignor, for an improvement in steam boilers, namely, C. L. Douglass, C. B. Squire and Mary C. Bingham, owners of one-half of said interest; Herbert F. Cook, C. N. Schmick, S. E. Welker and J. H. King, who are respective owners of one-eighth interest each under the said patent, parties of the first part, and The J. C. McNeil Company, a corporation organized under the laws of the state of Ohio and having its office and place of business at Akron, in the said state, party of the second part, hereinafter called the McNeil Company, made at Cleveland, Ohio, this fifteenth day of March, 1894.

"Witnesseth: That the parties of the first part have licensed and do hereby license and empower the party of the second

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part to manufacture, sell and use the steam boiler described in letters patent of the United States No. 478,690, dated July 12, 1892, and issued to Herbert F. Cook, assignor, and by him assigned to the said several parties of the first part, during the life and continuance of the said letters patent and during the life and continuance of any reissue of said letters patent. This license shall also be construed to cover any and all improvements in the said steam boiler which may be hereafter made and described and patented to the said parties of the first part, or any of them, during the life of any patent for said improvements issued by the United States of America, or any reissues thereof for any such improvements, devices or inventions as may be acquired by any of the said parties of the first part. The license hereby granted to the party of the second part by the parties of the first part, is an exclusive license to manufacture, sell and use the said boiler and any and all improvements described in the said letters patent hereinbefore recited, and also any and all improvements therein for which patents may be issued to any one of the said parties, or acquired by them, throughout the United States of America, excepting the states of California, Oregon and Washington, during the term and period covered by said letters patent No. 478,690, or during the life and continuance of any letters patent which may hereafter be secured or owned by the parties of the first part or either of them upon any improvements, devices or inventions to be attached to or make a part of said steam boiler described in said letters patent No. 478,690.

"2. In consideration of the said foregoing exclusive license granted by the parties of the first part to the party of the second part to manufacture and sell boilers and improvements therein described in letters patent of the United States No. 478,690, and any reissue thereof or improvements thereon, the said party of the second part hereby agrees with the parties of the first part to pay to the said parties of the first part the sum of \$1.00 per horse-power for every boiler manufactured and sold by said party of the second part under letters patent of the United States No. 478,690, provided said boiler is of the capacity of one hundred horse-power or more; upon boilers having a capacity of less than one hundred horse-power and equal to or greater than seventy-five horse-power, the royalty thereon shall be seventy-five cents per horse-power; upon all and any boilers manufactured and sold by said party of the second part embodying the said improvements whose capacity is less than seventy-five horse-power, the license fee or royalty to be paid therefor by said second party shall be fifty cents per horse-power.

"It is expressly understood and agreed between the parties hereto that in case the party of the second part should use any devices covered by letters patent of the United States for improvements in the said boiler described in said letters patent No. 478,690, which may hereafter be secured or owned by said parties of the first part or any of them, the party of the second part shall not pay any other royalty than that described in and provided for by the terms of this paragraph.

"3. The party of the second part agrees with the parties of the first part that it will account and pay over to the parties of the first part, semi-annually, on the first day of October and the first day of April in each year during the life of letters patent No. 478,690, and so long as the party of the second part manufactures and sells and uses boilers thereunder, for royalty on all boilers manufactured and sold and delivered by the said party of the second part during the six months immediately preceding the first day of September and the first day of March respectively in each year; that is to say, the said party of the second part shall on the first day of April in each year account for and pay royalties on all boilers which have been manufactured and sold and delivered during the six months preceding the first day of March of said year and on the first day of October, shall account and pay over to said parties of the first part all royalties due for the six months immediately preceding the first day of September in said year. Until further notified by any of the several parties in interest, all of the said accounts shall be rendered and payment made to Messrs. Bingham, Douglass & Squire, of Cleveland, Ohio.

"4. It is further agreed by and between the said parties hereto that for the purposes of this contract, one horse-power is defined to be ten square feet of heating surface in tubes.

"5. The parties of the first part agree to furnish to the party of the second part all drawings, measurements and information necessary to enable it to build a complete boiler under said letters patent No. 478,690.

"6. The said party of the second part agrees with the said parties of the first part that it will use all reasonable efforts during the continuance of this contract to promote the sale and use of the improvements covered by the said letters patent; that it will by all reasonable means in its power extend the use and sale of boilers embodying the said improvements throughout all the territory covered by the said contract. The said party of the second part expressly agrees that it will not during the term of said contract, manufacture, sell or use, or promote the manufacture, sale or use of any water-tube boilers other than the one described in the said Cook patent No. 478,690. For the

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purpose of this contract a water-tube boiler is defined to be a steam boiler having tubes filled with water and upon the outside of which the heat impinges.

"7. The said second party hereby admits the validity of said letters patent in consideration of the granting of the said license; and it is further mutually agreed between the said parties that in the event that the said letters patent No. 478,690, dated July 12, 1892, be finally determined to be invalid by the United States courts of final resort, then and in that case this contract shall be void from the date of such determination.

"8. The said second party agrees to keep full and accurate accounts of all sales made by it under this contract, which shall be open at all reasonable times to the examination of said first parties of their representatives duly authorized by them in writing.

"In witness whereof the parties have hereunto set their hands on the day and year first above written.

"(Signed) MARY C. BINGHAM,
 "C. L. DOUGLASS,
 "C. B. SQUIRE,
 "H. F. COOK,
 "J. H. KING,
 "C. N. SCHMICK,
 "S. E. WELKER.

"(Signed THE J. C. McNEIL CO.,

"By A. M. COLE, *Pres't.*

"J. B. CAMPBELL, *Sec'y and Treas.*"

Some time thereafter, and after The J. C. McNeil Company had been making boilers under this patent, that company went into the hands of a receiver. J. B. Campbell, the defendant in this case, is now the receiver. He complains the boilers then under construction under the order of the court, and, under the same order, proceeded to carry on the business, manufacturing other boilers under the patent, but claims that he did not construct the boilers other than those under way after he became the receiver under the agreement above set forth, but says that he went into court, and, under the order of the court, upon a proper application, obtained leave to purchase a one-eighth interest of the patent, and, under that purchase, he has been operating since he obtained the one-eighth interest referred to.

This action was brought, asking him to account for all the boilers he has constructed as receiver, and he sets up the defense that he has constructed no boilers under the agreement

save the two that he completed after the receiver was appointed. After the case was appealed to this court he obtained leave to amend his pleading and set up certain facts, and, on the facts so set up, asked for a reformation of the above contract.

The contract is termed by the parties a license. In several places where they seek to denominate the character of the contract, it is called a *license*, and, in one place, it is called an *exclusive license*; and the defendant claims that the contract conveyed to the McNeil Company only a *license* to use the patented improvement. The plaintiffs claim that the contract is more than a license, and that it is a grant and conveys all the monopoly that the plaintiffs had in the patent; and that claim is based upon the language used in the contract—that it conveyed to The J. C. McNeil Company the power to manufacture, sell and use said steam boiler described in the letters patent; and the contract says that “The license hereby granted to the party of the second part by the parties of the first part, is an exclusive license to manufacture, sell and use the said boiler and any and all improvements described in the said letters patent.”

And the question to be determined in the case is, whether the contract is a license, or an assignment, or a grant.

Formerly in the patent law there was a difference between an assignment and a grant, which distinction was determined by the amount of territory covered. If the territory covered in the assignment was all the territory covered by the patent, it then amounted to an assignment; if the territory covered was only a part of that conveyed by the assignment, it was known as a *grant*.

This contract, reserving a part of the United States to the plaintiffs under the former classification formerly in the patent law, would be known as a *grant*, but this distinction has now and *grant*. An *assignment* is where the party owning the patent whether covering the entire territory covered by the patent or only a certain portion of the same, is now called an *assignment*. So that, in the further consideration of this case, we will not undertake to keep up any distinction between *assignment*

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and *grant*. An *assignment* is where the party owning the patent, transfers all his interest and title and right to make, use, and sell, to his assignee. A *license* is where he transfers simply a use, simply a right to make and use, or use and sell, or make and sell the article made; it conveys no interest in the patent nor in the monopoly. Every patent gives to the patentee a right to make, use, and sell the article patented, and, when he disposes of this, he disposes of all that he has, and the one who obtains it from him has his entire right; while a license only operates under the rights of his licensor. So that if this contract transferred, as it purports to, all the interest that the plaintiffs had in the patent, then it can not be a license, but is an assignment. If the contract had omitted calling the interest transferred a license, there would be no room for construction of the same.

It is urged in the case, that, in the petition first filed, the parties themselves treated the contract as nothing more than a license and so denominated it. In determining, then, what was transferred by this contract, we have the language of the contract, which would make it an assignment, and also the language of the parties calling it a license, and we are called upon to say which it is.

The defendant, in his cross-petition to reform this contract, has offered testimony tending to show that the plaintiffs agreed to prosecute in their own name all suits of infringement of the patent, and has also offered evidence tending to show that The J. C. McNeil Company had no right to allow others to make the boiler containing the patented improvement; and from this testimony, which is contradicted by the plaintiffs, it is insisted that we should reform this contract so that it will appear when reformed, that the plaintiffs were to prosecute all suits for infringement, and had reserved to themselves the right to grant to others the privilege of operating under the patent. And it is claimed that if the contract is so reformed by inserting these two elements, then it will appear that the plaintiffs retained to themselves the title to the patent, and having retained the title to the patent, the defendant, The J. C. McNeil Company, is a licensee under such reformed contract. The evidence is of

that character that we would not be warranted, in law, in reforming the contract as we are asked to do. The evidence must be clear and certain before a reformation can be had. It is doubtful in our minds whether the evidence would warrant the court in believing that the agreement as to prosecutions and letting to others a right under the patent was as claimed by the defendant. He takes upon himself the burden of producing sufficient evidence to warrant the court in making the reformation. In this he has not sustained himself.

But it may be claimed that, although we can not use this testimony to reform the contract, yet it is proper testimony to consider in constructing the contract; and, if this testimony is properly in the case for such purpose, then it may be claimed that when the two elements above referred to are added to the contract, it clearly appears that the contract grants nothing but a license. And it may be considered to be the law that if parties make such a contract and write therein that the grantor is to carry on all suits for infringement, and is to grant other rights to operate under the patent, that he has then not disposed of his entire title, for he can not prosecute unless he is the owner of the title, nor can he grant licenses to others, or rights and privileges to others, under the patent, unless he is the owner; or, if he is a licensee, that his license shall run to him and to his assigns, etc.

The question arises, then, can these two elements be added to the contract by oral testimony? In determining this it is necessary to consider what the contract is as it stands. The granting part of the contract is the language used in making an assignment. Instead of the parties calling it an assignment, they have called it a license; and it has been determined in patent cases under such contracts that the contract is an *assignment* and not a *license* (*Moore Mfg. & F. Co. v. Hanger Co.*, 69 Fed. Rep., 998).

In *Waterman v. MacKenzie*, 138 U. S., 252, 256, Mr. Justice Gray says:

“Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon

the name by which it calls itself, but upon the legal effect of its provisions.”

The contract, then, as it is written, is an assignment. The law implies certain rights to the assignee under such an assignment, and one is that he is the only proper party to prosecute suits for infringement of the patent; and the other is that he has the right to grant to others a privilege to use the patent. The contract then would read, by supplying what is implied, that the defendant, The J. C. McNeil Company, was to prosecute all suits for infringement, and that he alone had the right to license others to operate under the patent. If this testimony, then, can be used as it is intended in construing the contract, it is to be used to contradict what is implied in the contract as it is written. This, we understand, can not be done.

In *Fawkner v. Wall Paper Co.*, 88 Ia., 169, second syllabus, it is said:

“Whatever the law implies from the language used in a written contract is as much a part of the contract as that which is expressed therein; and if the contract, found in the light of what the law thus implies, is clear, definite and complete, it can not be added to, varied or contradicted by extrinsic evidence.”

In *Bryan v. Duff*, 40 Pac. Rep., 936, it is said that the parol evidence is no more admissible to contradict or vary a contract implied from a written instrument than it is to contradict or vary the express terms of such instrument.

It has been repeatedly held that parol evidence can not be introduced to vary the clear and settled legal effect and meaning of a contract, nor can it be introduced to contradict or vary whatever the law implies from the contract.

It is unnecessary to cite further authorities except *Harris v. Oil Co.*, 57 Ohio St., 118, 125. In his opinion, in that case, Burket, C.-J., says:

“While the written instrument must be construed in the light of the surrounding circumstances, no new terms or conditions can be injected into such instrument, and no existing terms or conditions can be taken therefrom by averment in a pleading.”

And quoting from *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, he says:

“ ‘No averments can give to an agreement character it had not, and no admission can take from it the character it had.’ The effort to bind and change the construction of the written instrument in question, by averments in the pleadings as to its true construction and meaning, must therefore fail, and the instrument must be construed, and its legal effect declared from the language used when read in the light of the surrounding circumstances.”

The evidence introduced can not be used to reform the contract, nor is it competent to use the same in construing the contract; it is not admissible for such purposes.

The defendant claims that he, as receiver, did not come into the right to have and use the rights of the McNeil Company under the contract unless he adopted the same; and this is grounded upon his claim that the contract is but a license, and the license conferred upon the McNeil Company only a privilege, and that that privilege is not transferable, neither by law nor by the terms of the contract, and that he can not be held to account in this case unless he has adopted the same and estopped himself in that way from asserting that he has not, or that he could not use, this right that was personal to the McNeil Company. But this claim is based upon the ground that the contract creates only a license. Having found the contract to be an assignment, it created in the McNeil Company a property, and, it being a part of the property of the McNeil Company, it would, by force of his being made receiver of the property of the McNeil Company, become a part of the property in his hands as such receiver. And it is our holding in this case that he must account to the plaintiffs as asked in the petition, and, for such accounting, the case is referred to E. A. Hershey as referee to determine the amount due the plaintiffs under the petition in this case; to report his findings of the amount due in detail at the next term of this court, and the case will stand continued for such report.

Weed & Miller, for plaintiffs.

Allen & Cobbs, for defendant.

**METHOD OF WORKING OUT RIGHTS OF A CHILD BORN AFTER
EXECUTION OF A WILL.**

[Circuit Court of Lucas County.]

**FREDERICK A. J. WEILAND, AN INFANT, BY HIS GUARDIAN, v.
ANNA S. MUNTZ ET AL.**

Decided, October 3, 1903.

*Partition—Of Property Specifically Devised—Where Plaintiff Was Born
after Execution of the Will—And Property was Acquired after
Execution of the Will—And there is a Homestead Subject to
Widow's Life Estate—Guardian Disqualified from Serving.*

1. A qualified guardian may be substituted for a disqualified guardian as a party to a suit.
2. W died testate, leaving fourteen children. The youngest child was born after the execution of the will, and property was acquired after the execution of the will. The property owned by W at the time the will was executed was specifically devised, with the exception of the homestead in which the widow was given a life estate. *Held:* That the one-fourteenth interest in the estate which this child, otherwise unprovided for, takes by virtue of Section 5961, must be worked out of the entire estate, and not out of the after acquired property or the homestead burdened with the life estate; and the right exists, therefore, on the part of the guardian of this child to maintain a suit for the partition of property specifically devised.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This is an action for the partition of real estate. It comes into this court by way of appeal. It is submitted to us upon the pleadings and an agreed statement of facts. There have been various parcels of land partitioned with respect to which no question has been made. It is now sought to partition a certain city lot and a part of another lot, of which the defendant, Gooderman, claims to be the owner in entirety. It is claimed by this defendant that the plaintiff had no title in this real estate; that he, plaintiff, is not a tenant in common with defendant and that plaintiff, therefore, has no right to have partition.

It appears that John Weiland was the owner of this and of other real estate in his lifetime; that he died in the year 1889,

in Wood county, Ohio, testate as to part of his estate and intestate as to part; that his will was executed in 1880; that a certain tract of land with respect to which he died intestate—a tract of about thirty-nine acres—was situated in Wood county, Ohio, and was acquired by him after he had made his will. It also appears that the plaintiff, who is one of his children—there being in all fourteen children—was born in the year 1886, some six years after this will was executed and some three years before the death of decedent.

It is contended on behalf of the plaintiff that no provision was made for this child in the will, and that therefore, by force of Section 5961, Revised Statutes, the will was revoked, *pro tanto*, or was invalid as to this child, and that this child comes in for a full portion of the estate, that it takes by inheritance precisely as if no will had ever been made devising any of these lands, and that therefore it takes its share as a vested estate in each parcel of land of which the decedent died seized.

On the other hand it is contended that this is not so; that in the first place there is provision made for this child, so that it takes nothing by force of Section 5961; also that if provision were not made so that it takes an interest under that section; that what devolves upon it is a right to recover an aliquot part of the estate of the decedent—not in kind, not in specie, whether in land or in chattels—but as if it were in the nature of a debt of the estate to such heir, or a claim in his favor as a creditor enforceable against the estate and against the heirs as well.

By his will the decedent devised one tract of land in Wood county, Ohio, to eight of his children, naming them, and devised this lot and part of a lot in controversy to five other of his children, naming them. This still left undisposed of a fifty-acre tract of land in Wood county, constituting the homestead, with respect to which his will contains a provision that his wife—who afterwards became his widow—should have an estate for life therein, and that the remainder should go to his children generally, without naming them. It is needless to repeat that the name of the after-born child did not appear in the will. The undevised thirty-nine acre tract was acquired by the testator after the execution of his will.

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It is contended on behalf of defendant, Gooderman, that the plaintiff should be relegated in the enforcement of his rights to the undevised land in Wood county and to this fifty-acre tract of land; that he should not be permitted to recover anything out of either of the tracts specifically devised to the children named.

There was a preliminary question in the case which I have passed by, and which I will notice here. Suzanna Weiland is named in the will as executrix and she has qualified as executrix. By the will she is made guardian of all the minor children, and by virtue and in pursuance of that provision of the will she was appointed guardian of this plaintiff as well as of the other minor children of the decedent. Her right to prosecute this action as such guardian was questioned by a demurrer filed in this case. It seems to have appeared to the court below that she was disqualified from acting as such guardian, and it seems to us very clear that, under the circumstances, she was disqualified. It also appears by the decision in the case of *Scobey v. Gano*, 35 O. S., 550, which was a proceeding to appoint as guardian a person duly qualified, that the former action of the court in appointing a disqualified person might have been attacked collaterally—that is to say, it might be ignored—and it is urged here that the action of the court of probate in appointing this guardian may be and should be ignored, and that therefore the case was not properly in court. The court below, however, on motion of the plaintiff, permitted another person to be appointed subsequently as the guardian of the estate, to be substituted for the person disqualified to act as such guardian. This was done over the objection of this defendant; but subsequently the defendant answered and the case went to trial and was decided in the court below upon the merits, and from the judgment of that court an appeal is taken here.

Aside from the question as to whether or not the defendant waived this objection by answering instead of allowing judgment to be entered and prosecuting error, we are of the opinion that the action of the court in allowing this substitution was strictly legal and regular; that the substituted guardian is duly in court; that the plaintiff is duly in court, and that the judg-

ment of the court herein will be binding upon the parties, so that they need not have any apprehension of such judgment as may be entered herein being ignored or treated as a nullity because of the action having been begun by Suzanna Weiland as guardian. Upon that point we hold against the defendant.

Coming back to the consideration of the main question, as to whether plaintiff acquired any estate or interest so as to become a tenant in common in this property, I should state a few additional facts.

Part of the owners of the undivided thirty-nine acre tract in Wood county, soon after the will was probated, in 1890, conveyed their interest to a man by the name of Radcliff. Afterwards Radcliff instituted an action in partition in Wood county making this plaintiff a party defendant. The plaintiff, by guardian ad litem, appeared and answered, and claimed an undivided one-fourteenth. The land was partitioned and a one-fourteenth interest was set off to and received by the guardian of the plaintiff. Soon after the probating of this will the owners of the lot and part of a lot here in controversy conveyed the same by warranty deed to one Brown. Brown subsequently conveyed the property by warranty deed to the defendant, Gooderman.

Among the claims of Gooderman is this: that his minor—this plaintiff—should have worked out for him his interest in the whole estate by the partitioning of the tract of land specifically devised to the eight heirs, or upon the partitioning of the thirty-nine acres of land not devised that it should be worked out of the fifty-acre homestead tract in which the widow has a life estate. The tract specifically devised to the eight heirs is not partitioned in this proceeding. The claim is that primarily it ought to have been worked out of the thirty-nine acres, and that it not having been worked out there, plaintiff is precluded from having it worked out of this land specifically devised; also that the plaintiff should seek satisfaction of his claim out of the fifty acres yet undisposed of. It will be remembered, however, with respect to the fifty acres, that a life estate having been given therein to the wife, that during the existence of that life estate it can not be partitioned as against her wish, or without her consent, and partition can not now be had, so that if the

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plaintiff should undertake to work his interest out of that land, his right to do so would probably be postponed until after the death of the widow. It might be effected by some form of decree, but it could not be occupied or enjoyed, or the plaintiff could not have an interest in possession until after the death of the widow.

The language of the statute upon this subject does not seem to us to be entirely clear or free from doubt as to the question made. It seems to us to afford very strong ground for the contention made by the defense. A preceding section (Section 5959) making provision for a posthumous child—one born after the death of the testator—provides that the birth of such a child shall have the effect of revoking the will, if it were the only child. Section 5961 says nothing about the will being revoked or rendered a nullity, either *pro tanto* or otherwise, and it provides for the cases of posthumous children where there are other children, and pretermitted children who are not posthumous, that is to say, such as are born after the making of a will and before the death of the ancestor, and the plaintiff comes within that class, that is not posthumous child, but stands upon the same ground here, there being other children. And this section of the statute reads:

“When a testator at the time of executing his will shall have a child absent and reported to be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in the will, the absent child, or the child born after the execution of the will, shall take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate.”

In this case the share would be one-fourteenth, and therefore he must take one-fourteenth of the estate—but whether in specie, or whether, as if there had been no will made, he would inherit an interest in each tract of land, the statute does not say. It provides further—following right along with the reading that—

“toward raising which portion the devisees and legatees shall equally contribute in proportion to the value of what they shall receive under the will, unless in consequence of a specific devise

or bequest, or of some other provisions in the will, a different apportionment among the devisees and legatees shall be found necessary, in order to give effect to the intention of the testator, as to that part of the estate which shall pass by the will."

That, I say, seems upon the reading to afford considerable ground for the contention of the defendant here that there is a portion to be raised by contribution of the devisees, respect being had to the will and the purpose of the testator, so that if a certain share should be exonerated from the burden that circumstance should be respected in apportioning the obligation, that the portion should be made up by contribution, not necessarily in specie as if it were a general claim—and that the after-born child will not inherit it in the sense or in the degree that he would if the ancestor had died intestate. And there are other clauses of the statute bearing upon this point and adding force to this contention, in Sections 5978 and 5979. And our attention is called to the fact that this statute is substantially, if not exactly, a transcript of the statute of Massachusetts upon the same subject, which has been in force in that state for a long time; and it is urged that therefore, upon a principle applicable to a case of this kind, it should receive the construction that the statute in Massachusetts has received at the hands of the courts of that state, and in that connection our attention is called to a case in 137 Mass., 527 (*Bowen v. Hoxie*), where it is held, in effect, that the claim is in the nature of a debt of the estate. In that case there were not devises of real estate, but were bequests of personalty, and in working out the share of a posthumous child the court required that the property which constituted the residuum of the estate, that not specifically bequeathed, should be first exhausted before a specific bequest should be touched. I will not stop to read from the case. It appears to proceed upon a very fair course of reasoning.

Before proceeding further with this discussion I should come back to a matter which I have passed; and that is the question made as to whether or not provision was made for this child in the will? Now we have cited to us against the contention of the defendant, the case of *Rhodes v. Weldy*, 46 O. S., p. 234.

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I read from the opinion by Chief-Justice Owen. The child not provided for in that case was named Elizabeth, and the judge says:

"If Elizabeth was provided for by the will of her father, it was not revoked by her birth after its execution, and the judgment below should be affirmed. If there was such provision made, it is to be found in these words: 'I will and devise to my wife, Harriet Young, all my real estate wherever situate, to use and occupy as to her may seem proper, during her natural life, and after her death to the heirs of her body begotten.'"

Substantially the same as the first provision of the will under consideration; that is item 3 of that will. He then continues (p. 236):

"It will not be contended that this is a specific provision for the plaintiff. If it is a provision at all, it is so because the language is comprehensive enough to include her. It was evidently written with a view only to the maternity of the 'heirs of her body begotten,' and without reference to their paternity. It was intended as a comprehensive direction of the course which the property should take after the immediate object of the testator's bounty should die, unless she should die without issue, in which case other direction is made in the will. Much learning and research have been expended in discussing the character of the devise in remainder, and whether it is a vested or contingent interest.

"In the view we take of the case, this is wholly immaterial. The question is, has Elizabeth been provided for in the will in the sense of the statute. It is not conclusive of this question to say that a 'disposition' has been made which may inure to her benefit. 'Disposition' and 'provision' are not necessarily convertible terms."

He then proceeds to hold that notwithstanding the fact that this general provision in favor of the children or heirs of the body of his wife would inure to the benefit of this after-born child, the same as for the benefit of the others, that could not under the statute be deemed a provision for that child. That was a decision under Section 5959 of the statute and not under Section 5961; but according to our view the statutes in this respect are alike, and therefore, the authority is in point.

A later case, in the 66th O. S., 233 (*German Mutual Ins. Co.*

v. *Lushey et al*), is under Section 5961, and is in point as indicating what the court regard as "provision" for an unborn child. There the will specifically provided: "Should any child or children, we now having only one, George Gabriel, be born to me hereafter, it shall in no wise alter or revoke this will and testament." Now the wife of the testator in that case was at the time enciente with this after-born child, and he seems to have had in mind the probability of its being born alive and attempted to cut it off and made a provision in respect to it; but the Supreme Court says that is not a provision for it, but against it, and gave full force and effect to Section 5961 and so gave to it an undivided one-half of the estate.

Now I will say something more upon this question as to the right or interest that the plaintiff inherited—whether the right of contribution is to be worked out in a court of equity as if it were a claim, secured, perhaps, by an equitable lien, or whether it was an estate cast upon him by inheritance the same as if there had been no will.

I have already indicated the line of argument of the defendant and the chief authority relied upon, to-wit, the Massachusetts case, and will say that we were very strongly inclined at first to follow that decision and that course of reasoning with respect to our statute; but upon further consideration we have concluded that the question is set at rest in the state of Ohio by this decision to which I have just adverted in the 66th Ohio St. Reports, and that the decision there requires us to resolve this question against the contention of defendant. To be sure, in that case this precise point does not appear to have been debated or in any way called to the attention of the court and perhaps was not considered by it. There was a single tract of land; the land was devised by the husband; the child living at the time the will was executed was cut off by the will and the court decided that the child afterwards born was not cut off. The question arose between the after-born child and the mortgagee of the husband. The husband had undertaken to mortgage the entirety. The after-born child, in the action between it and the mortgagee, claimed an undivided one-half. The court held that the child was entitled to an undivided one-half. It does not hold, how-

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ever, that it had a right to compel contribution or had a right to compel the mortgagee of the entirety to make up to it the value of this undivided one-half—he retaining the title to the land, but it holds that by force of this statute the title to an undivided one-half of this land was cast upon this child. After discussing the case, the opinion closes with this sentence (p. 241):

“It follows, therefore, that George Lushey, the husband of the testatrix, when he gave the mortgage to plaintiff in error, owned but one-half of the premises described in the mortgage, and that the judgment of the court of common pleas was right, and that the circuit court did not err in affirming the judgment.”

If the court had taken the view contended for by the defendants here, it would have been obliged to say that he owned the whole premises, subject to this charge, and would have been obliged to adjudge that the child could not recover in that form of action then pending before the court, but must enforce payment of an amount equal to the value of the estate. The action was by the grantee in a mortgage to foreclose the mortgage upon the entirety; it was in an action where the child appeared and answered with respect to that state of facts that the court says that the plaintiff in error owned one-half of the premises described in the mortgage. The syllabus reads as follows:

“Where a testatrix, having a child living, devises all her estate to a third person (in this case her husband), without making provision in her will for an after-born child, such after-born child, if it survive the testatrix, by virtue of the provisions of Section 5961, Revised Statutes, will inherit from the mother as her heir at law, as if she had died intestate, notwithstanding that by clear and explicit language in the will such testatrix undertakes to disinherit such after-born child.”

Now in entering judgment here, as we shall, in favor of the plaintiff and against the defendant, adjudging that the plaintiff is the owner of an undivided one-fourteenth interest in this land and is entitled to partition, we believe that we are following the law as laid down by our Supreme Court. There is much authority upon this question and in support of this conclusion, or, I may say, in harmony with this decision of the Supreme Court.

We cite 2d Woerner on the American Law of Administration, page 1240, being the latter part of Section 565, and cases there cited, which we have examined, and one especially, which I shall not take time to read from, but which seems to be very much in point—the case of *Ward v. Ward*, 120 Ills., 111.

There is a question presented in this case as to improvements, rents and profits, but we understand that there is no difference about the rights of the parties as to these and they will be worked out without the intervention of the court. The case will be retained in this court and an order of partition will be issued out of this court.

Beard & Beard, for plaintiff.

Brown & Geddes, for defendants.

**MORTGAGE EXECUTED BY AN INDIVIDUAL MEMBER OF A
FIRM IN BAD FINANCIAL CONDITION.**

[Circuit Court of Hamilton County.]

W. A. GOODMAN, JR., ET AL V. JOSEPH RAWSON ET AL.

Decided, January 14, 1904.

Mortgage—Treated as an Assignment to a Trustee—But not in Contemplation of Insolvency—Purpose of a Member of a Partnership—In Mortgaging His Individual Property to Raise Funds for the Firm—Determines the Character of the Transaction.

1. Although all the proceedings, in the matter of securing a loan from a bank through an intermediary, may have the appearance of a transaction by the intermediary on his own account, yet when subsequent acts discredit this theory, and at the last the bank buys in the property covered by the mortgage securing the loan, taking title in the name of the intermediary, the mortgage will be treated as an assignment to a trustee.
2. Where a member of a firm, not actively participating in the business of the firm, executed a mortgage on his individual property for the purpose of raising money for the use of the firm, the question

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whether or not the mortgage was executed in contemplation of insolvency with intent to prefer one or more creditors, depends on what the mortgagor contemplated and intended at the time he executed the mortgage, rather than on the financial straits of the firm of which he may not have had full knowledge.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

The plaintiffs seek to have a mortgage, executed and delivered by the defendant, J. W. Cotteral, to the defendant, Joseph Rawson, declared an assignment in trust to a trustee, made in contemplation of insolvency with the intent to prefer one or more creditors, under Section 6343, Revised Statutes, as in force on January 6, 1896.

In December, 1895, the defendant, The First National Bank, held seven promissory notes executed and delivered by J. W. Cotteral and J. W. Cotteral, Jr., and payable to the order of J. W. Cotteral & Company, a firm composed of J. W. Cotteral and junior, amounting to \$27,500. At that time the firm had a contract for the erection of a school house in Detroit, Michigan, at a cost of nearly \$200,000. The work was not progressing according to the terms of the contract, the estimates were delayed, and when obtained were less than anticipated, material needed first in construction was not delivered, while that which could not then be used was on the ground, with the vendors demanding payment. Thereupon J. W. Cotteral, Jr., applied to the First National Bank for an additional loan of \$12,000, which the officials of the bank agreed to secure for him. A mortgage on the real estate of J. W. Cotteral, Sr., was offered as security for the old debt and the present loan, making in all the sum of \$39,500.

Afterwards the defendant, Joseph Rawson, who was vice-president of the bank agreed to make the loan, and on January 6, 1896, a mortgage was executed and delivered to him by J. W. Cotteral upon all his real estate to secure ten (10) notes amounting to \$39,500, executed by J. W. Cotteral and J. W. Cotteral, Jr., and payable to the order of J. W. Cotteral & Co.; and at the same time Joseph Rawson executed and delivered to the bank his promissory note for \$39,500 and gave the notes of the Cotterals for the same amount as collateral security, and from

the proceeds thereof gave a check to the bank for \$27,500, for which he received the seven Cotteral notes, which were surrendered to the Cotterals, and caused a check for \$12,000 to be credited to the account of J. W. Cotteral & Co. in the bank. It is claimed that this loan was, as appears on the face of the transaction, made by Mr. Rawson on his individual account; but he admits that he had never before loaned money upon real estate security, that he never paid the bank any interest on his note, saying that he expected the interest collected from the Cotterals on the collateral note to pay it. That a part of the property was bought by the bank at a consideration less than the amount of the note of Mr. Rawson, and that the title was taken by Rawson as trustee for the bank. Although the original transaction had the form of a *bona fide* loan from Mr. Rawson to J. W. Cotteral, the subsequent acts of the parties continuously discredit it, until the final act of purchasing the property in the name of Mr. Rawson as trustee reveals the true situation of the parties. We are impelled therefore to hold that the mortgage was an assignment in trust to a trustee.

But we find, however, that it was not made in contemplation of insolvency with the intent to prefer one or more creditors. The facts relied on by plaintiffs to prove that it was so made are the financial condition of the firm of J. W. Cotteral & Co. at the time, the pressing demands of creditors during a few months just prior, the devices resorted to by J. W. Cotteral, Jr., to conciliate the creditors and postpone payment, and the threatened cancellation by the school board of the Detroit contract, of all which matters J. W. Cotteral had little, if any, knowledge, as he was practically out of the partnership for a year prior to its assignment. Counsel for plaintiffs admit this, but say that J. W. Cotteral, Jr., knew them and that therefore the senior member was bound to know. It is true that he would be bound by the action of J. W. Cotteral, Jr., as a member of the firm or as his agent; but the inquiry here is what did the mortgagor contemplate and intend at the time he executed the mortgage? What was the state of his mind, and how did the facts relied on influence him? It is clear that if not brought

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to his attention they could in nowise have influenced his mind or fixed his purpose in the execution of the mortgage.

It appears from the evidence that J. W. Cotteral, Jr., negotiated the loan, and at his request the note and mortgage was signed by J. W. Cotteral.

We hold therefore that the mortgage was not made in contemplation of insolvency with the intent to prefer one or more creditors, and there will be a decree for the defendants.

John C. Healy and Malcolm McAvoy, for plaintiffs.

Stephens, Lincoln & Stephens, contra.

LIABILITY FOR INJURIES TO ONE FALLING DOWN AN OPEN ELEVATOR SHAFT.

[Circuit Court of Lucas County.]

THE CHAMBER OF COMMERCE BUILDING COMPANY V. FREDERICK M. KLUSSMAN.

Decided, October 31, 1903.

Negligence—Tenant of a Building Attempts to Enter an Elevator—Door Open and Elevator at an Upper Floor—Tenant Falls to Bottom of the Pit—Rule as to Passenger and of Reasonable Care—Previous Condition of Door—Emergency Necessitating a Discharge of Jury.

1. Where the wife of a juror dies during the trial of a cause, and the juror states that owing to his bereavement he will not be able to perform the duties of a juror for the time being, and one of the parties to the trial is unwilling to proceed with eleven jurors, an emergency has arisen which falls within the provisions of Section 5195, authorizing a court to discharge a jury.
2. In a suit for damages on account of a fall down an elevator shaft, where the claim is made that the door of the shaft was open at a time when the cab was absent, and a probable reason for the door being open was that the latch was out of order, permitting

the door upon being closed to rebound and remain open, it is admissible to show that on previous occasions the door had behaved in that way, as tending to show a previous and continuous defective condition, and notice thereof to the defendant.

3. One who has a right to ride on an elevator is not required to make a full and attentive observation before attempting to enter the cab, but if he finds the door of the shaft open he is at liberty to assume the presence of the cab, and to rely to some extent at least upon its being there; and one in that situation is entitled to the benefit of the rule applying to a passenger on an elevator.

PARKER, J.; HAYNES, J., and HULL, J., concur.

The action in the court below was by Klussman against The Chamber of Commerce Building Company to recover for an injury claimed to have been sustained through the negligence of the defendant company in allowing a door leading to an elevator shaft in the Chamber of Commerce building, where Mr. Klussman was a tenant, to remain open, whereby he was misled supposing the cab of the elevator to be there, and walked into the shaft and fell to the bottom thereof and was severely injured. He recovered in the court below a verdict for \$5,000, which amount the court required him to reduce to \$2,500, and judgment was entered for that amount. But The Chamber of Commerce Building Company, not being satisfied, prosecutes error here. It contends that the court erred in discharging a former jury which had heard a part of the testimony in the case.

It appears that while the trial of the case was in progress the wife of one of the jurymen died, and that necessarily required a cessation of the trial for a while; and afterwards it appears that the juror came into court and reported that he would not be able to sit in the case any more at that term on account of his bereavement, and the court, upon consideration of the matter, discharged the jury. One of the parties was ready to proceed with the remaining jurors, but the other party was not, and the court holding that the other party could not be compelled to proceed, there was nothing left for the court to do but to discharge the jury; and we think that this was an

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emergency coming within the provision of Section 5195, Revised Statutes, authorizing a court to discharge a jury, and that there was nothing in that of which the plaintiff in error had a right to complain.

It is said that the court erred in admitting certain testimony at page 56 of the record, and turning to that page we find some testimony upon the subject of the condition of the elevator upon former occasions. One of the complaints about this elevator was that the boy who operated it was negligent in leaving it open; another was, that the hook on the door was out of order and that when the door was pulled shut it would not latch or lock and remain shut but would rebound, and that the door was open upon this occasion through the negligence of the elevator boy in failing to shut it, or in consequence of such defect in the lock, and this question was asked:

“You may state what you observed and how the door operated that day?,” referring to a former occasion. This was objected to, the objection overruled and defendant excepted. The witness answered: “I went in to take the elevator and the car was not there. I waited, oh, a moment, I guess, and the car came down and I stepped inside, and the car started and the elevator boy pushed the door to and it flew back; my attention was called to it, and I called his attention to it.”

Now we think that that was competent on the question of whether the lock of the elevator worked properly, or whether it was out of order, and whether it was probably in consequence of that that the door was open upon the occasion that the plaintiff below received his injury, and in that view we are sustained by a decision in 21 Colorado Reports, page 435, *The Colorado Mortgage & Investment Co. v. Rees*, which is directly in point; and we think too that the ruling rests upon reason and does not require very much authority. The third paragraph of the syllabus is as follows:

“Where, in an action for damages for injuries sustained by falling down an elevator shaft, the scope and tendency of the plaintiff’s evidence was to show that the elevator door was open at the time of the accident because of the defective condition

of its lock, as claimed by plaintiff, it is admissible to show that the door was open at times antecedent to the accident in corroboration of that claim, and as tending to show a previous and continuous defective condition and notice thereof to the defendant."

The important question in this case, and the one most debated is whether the plaintiff below was guilty of contributory negligence. It appears that upon the occasion when he was injured, he left his office on the second floor and went to the elevator and inquired of the boy operating it where he could find a hammer which he required for opening a box of goods in his office. The boy stated to him that he could probably obtain a hammer from the janitor on the floor next below, and thereupon he went into the elevator and was taken by the boy down to the floor next below, to-wit, the first floor of the building, and went to the room of the janitor, which was some seventy-five or eighty feet from the elevator, made known his wants to the janitor, was furnished with a hammer, and came back to the elevator. The door was open, as I have said, and supposing that the elevator-cab was still there—and without stopping to make careful observation—he walked right in and fell down to the bottom, some fifteen or sixteen feet, and was injured. It appears that the hallway was reasonably well lighted by the sun. This accident happened about three o'clock in the afternoon and there was no necessity for any artificial light in the hall, and, customarily, artificial lights were in the cabs. The plaintiff says there was no artificial light on this occasion, but we think the preponderance of the evidence establishes the fact that there was a light in the cab. This elevator-shaft accommodated two elevators, running side by side and both opening out into the main hall. The one upon which plaintiff had come down one floor was the easterly elevator of the two; being one that was sometimes used for freight, it having a place below that where passengers ride for the carriage of freight, although it was a regular passenger elevator. The testimony convinces us that there were electric lights burning in both elevator cabs.

The question is, whether the plaintiff below was guilty of negligence that will defeat his recovery because of his having

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failed to make such observation before he attempted to get into the cab as would have disclosed to him that there was no cab there—as would have disclosed to him that he was going to walk into a pit. Our attention is called to a number of cases decided by courts of last resort in different states, in some of which it has been held that a person going to an elevator shaft where a door was open, and falling down, was negligent and could not recover, and some holding that it was not negligence, but the circumstances of each case differ from every other. It would be interesting to refer to those cases and discuss them somewhat, but for lack of time it can not be done by us to-day. As in other cases of negligence so in elevator cases, each case stands upon its own facts, and it seems to us that these cases cited to us were all correctly decided and that they are not inconsistent with one another, though somewhat peculiar results seem to be attained. In Massachusetts there is a somewhat different rule of law as to the burden of proof, or the method of presenting a case than that generally prevailing upon the subject of contributory negligence. It appears that in Massachusetts it devolves upon the plaintiff to establish in the first instance that he was free from negligence—that he was not guilty of contributory negligence—and that, as I understand it, is by virtue of a statute of that state.

It is apparent that if the plaintiff had made careful observation, he would have discovered that there was no elevator-cab at this point at that time. The record discloses that the jury viewed the premises, and therefore we felt at liberty to view the premises, and did so. We discovered that the back part of the elevator-shaft is plastered and that it has a somewhat yellowish color, similar to the walls of this court room; that the shaft has in front open iron-work; that the doors are of somewhat the same character, and that the cab at the back is open iron-work, so that one looks through this iron-work and sees the yellow background of the plastered wall at the back part of the shaft, and our observation was that, whether there were lights in the cab or not, it would not be apparent to one approaching the elevator to ride in the cab that the cab was there or that

the cab was absent, unless he made a somewhat careful observation. We came to this conclusion from the testimony of the witnesses as well as from our own observation, we having made observation when the cabs were there and also when the cabs were not there, and when they were lighted and when they were not lighted.

We are convinced by the testimony and by these observations that we felt at liberty to make, that one hurrying along about his business, with his mind somewhat preoccupied, his attention and his thought not drawn directly to the question whether there was an elevator cab present or not—making a casual or a hasty observation with the door open—would not readily observe the absence of the cab. If those cabs were made with solid backs, having a different color from the wall of the shaft, for instance, the wall being black and the back of the cab white, or vice versa, then it would be apparent in an instant. Upon the occasion of the accident, according to the evidence, the western cab was down, and it had an electric light burning in it, and we observed the situation there with that state of facts existing, and our conclusion is the same upon that.

Now it does not appear from the authorities that one is required—one who has a right to ride upon an elevator—to make full, careful and attentive observation, but if he finds the door of the shaft leading to the cab, or where the cab ought to be, open, he is at liberty to assume its presence and to rely to some extent at least upon the cab being there. We are not prepared to say that one might walk blindly into a place of that kind without looking at all and yet be free from negligence, but if a hasty and cursory observation of the situation would lead one to suppose that the cab was there, we do not believe that under the authorities he would be charged with negligence if he proceeded upon that assumption. It is clear that that is what the defendant did here; he supposed the cab was there; he assumed that it was there; he did this because of the door being open and because of the general appearance of things not attracting his attention to the fact that the cab was not there. Of course, if he had looked carefully down toward the floor,

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he would have observed that there was no floor there for him to step upon. And directly upon this subject is the case of *Tousey v. Roberts*, 114 N. Y., 312, and where it is held:

“An elevator in a building, for the carriage of persons, is not supposed to be a place of danger, to be approached with great caution; on the contrary, it may be assumed when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination.”

We think the court charged the jury very carefully as well as very fully in this case and that the plaintiff in error had no reason to complain of the charge. It is in some respects very favorable indeed to the plaintiff in error. In our opinion the defendant in error was entitled, under the circumstances existing at the time, to the rule applicable to a passenger upon an elevator. He went there for the purpose of taking a passage upon it and had a right to do so, and yet the court charged against him upon that proposition, and charged that the rule touching a passenger was not applicable to that situation. The court charged the jury that he must exercise ordinary care in approaching the elevator to discover whether there was a cab there or not, notwithstanding the fact that the door was open; and we are not prepared to say that the jury was wrong in finding that he exercised ordinary care, nor can we say that, as a matter of law, he was guilty of contributory negligence, and therefore we feel obliged to affirm this judgment.

John F. Kumler, J. Kent Hamilton, for plaintiff in error.

E. L. Twing, George E. Wells, for defendant in error.

**RESTRICTIVE COVENANTS CONNECTED WITH THE SALE
OF A BUSINESS.**

[Circuit Court of Portage County.]

JOHN A. EWING v. ERWIN D. DAVIS.

Decided, February Term, 1903.

Injunction—Equity Jurisdiction—Where One in Selling a Business Agrees Not to Engage in the Same Line Again in That Territory—And Also Stipulates as to Liquidated Damages in the Event of Violation of the Agreement.

1. Where one in selling his business to another agrees, for the consideration received, not to engage again in the same line of business within a specified territory of reasonable extent, either for himself or in behalf of any other person, so long as the purchaser is engaged in the same line in that locality, and further agrees that, in the event of violation on his part of any of the conditions of the agreement, he will pay to the said purchaser the sum of \$500 as liquidated damages, a court of equity has jurisdiction to enforce the restrictive covenant, notwithstanding the stipulation as to liquidated damages.
2. In a case where the territory embraced in such a covenant is a county, and the business conveyed is that of a jeweler, optician and watchmaker, and the limit as to time is as above, the covenant is not unreasonable, nor oppressive, nor against public policy.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Plaintiff and defendant were engaged as partners in the business of jewelers, opticians and watchmakers at Kent, in this county. In June, 1900, plaintiff purchased from defendant for the consideration of \$1,857.44 his interest in the business; and in the written contract of sale it was stipulated, "The said Davis further agrees for the consideration aforesaid not to engage again in business as a jeweler, optician or watchmaker, as jeweler merchant or jeweler salesman, manager or peddler, on his own account or in behalf of any one else at any place in Portage county, Ohio, so long as said Ewing is engaged in said business in said Kent. And said Davis further agrees for a violation

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hereof on his part of any of the conditions and stipulations hereof to pay to the said Ewing as liquidated damages the sum of \$500."

After the sale Davis went to Cleveland, remaining there two years in business, and then returned to Kent and opened up a business as jeweler, optician and watchmaker, he being the manager of the business, which belonged to his brother. Plaintiff is still in business in Kent in the same room occupied by plaintiff and defendant before the purchase.

Defendant had for over twenty-four years been engaged in the jewelry, optician and watchmaking business in Kent; for six years prior to the same, being associated with plaintiff, and had a good reputation as a successful jeweler, optician and watchmaker throughout Portage county. At the time of the sale to plaintiff of his interest in the business defendant fully expected to remain in Cleveland, and stated to plaintiff that the amount of liquidated damages placed in the agreement was wholly immaterial to him, as he proposed to do business in the future in Cleveland.

The action is for an injunction to restrain defendant from conducting the business of jeweler, optician and watchmaker in Portage county in accordance with his agreement. The principal objections made by defendant to the granting of an injunction are:

First. That the only remedy that plaintiff has is an action at law to recover the \$500 set forth in the contract as liquidated damages.

Second. That the covenant embraces too much territory, and is unreasonable and oppressive.

As to the first objection. It is true that the contract provides for the payment of \$500 as liquidated damages in case of failure to perform the restrictive covenant; but that of itself is not sufficient to defeat the jurisdiction of a court of equity. It is only when, from an inspection of the contract and the circumstances surrounding the parties at the time the contract was made, it appears that the covenantor was to have the alternative of performing the particular act or paying the specific sum, that an

injunction will not be granted. If it was the intention of the parties at the time of the contract that the covenant was to be performed and the sum specified as liquidated damages was merely a security that it would be performed, then the jurisdiction of a court of equity will not be excluded.

In the case of *Diamond Watch Co. v. Roeber*, 106 N. Y., 473, Roeber, the defendant, at the time of making the contract executed to the purchaser a bond in the penalty of \$15,000, conditioned to pay that sum as liquidated damages in case of a breach of his covenant, and the court held that a court of equity had jurisdiction to compel the performance of the covenant by injunction. Andrews, J., in the opinion, says:

“It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in this case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance (*Phoenix Ins. Co. v. Insurance Co.*, 87 N. Y., 400, 405). But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in *Long v. Bowring*, 33 Beav., 585, which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, ‘All that is settled by this clause is that if they bring an action for damages the amount to be recovered shall be \$1,000, neither more nor less.’ There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option purchase his right to manufacture and sell matches on payment of the liquidated damages.”

What was the intent of the parties to this contract? Davis and Ewing had built up a trade in the jewelry, optician and watchmaking business. Davis had been a long time in the busi-

ness, was known throughout the country as an expert jeweler, optician and watchmaker. It was of great importance to Ewing that he should not be a competitor against him in that locality. Davis had determined to permanently quit the business at Kent and go to Cleveland and build up a city business. From these circumstances it is apparent that both the parties intended that the covenant was to be performed. Furthermore, the contract says, "And said Davis further agrees for a violation hereof on his part of any of the conditions and stipulations hereof to pay to the said Ewing as liquidated damages the sum of \$500," showing clearly that it was intended as a penalty for a breach of the contract and security for its performance, and not a consideration for the privilege of re-entering business.

In *Dooley v. Watson*, 67 Mass. (1 Gray), 414, Shaw, C.-J., says:

"The promise of the defendant to pay the plaintiff \$100 if the defendant should fail to perform his agreement to convey the land, was merely a security for the performance of that agreement. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out. The agreement between the parties in this case is clearly an alternative agreement. It was an absolute agreement to convey real estate, and may be treated in all respects as such either in a court of law or equity."

In *Phoenix Ins. Co. v. Insurance Co.*, 87 N. Y., 400, it is held:

"If the primary intention was that the very thing covenanted should be done, the annexing of a penalty is regarded merely as a security for the performance of the covenant and not as a substitute for it."

In *Howard v. Hopkins*, 2 Atk., 371, Lord Hardwicke said:

"In all cases where penalties are inserted in an agreement in case of a non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding."

In *French v. Macale*, 2 Dru. & W., 269, Lord Chancellor Sudgen very clearly puts the point. He says:

“The question for the court to ascertain is whether the party is restricted by the covenant from doing the particular act, although if he do it a payment is reserved; or whether according to the true construction of the contract its meaning is that the one party shall have a right to do the act on payment of what is agreed upon as an equivalent.”

As we have said, tested by these rules, there can be no question as to the proper construction of the contract between these parties.

Counsel for defendant calls attention to the case of *Dills v. Doeblor*, 62 Conn., 366, and relies very much upon it. The facts of that case are entirely different from the facts of the case under consideration. The clause of the contract passed upon was as follows:

“And it is further mutually understood and agreed by and between the parties hereto that the said Doeblor may be at liberty to practice dentistry in said Hartford at any time after termination of this contract by the paying to said Dills \$1,000.”

Andrews, C. J., who delivered the opinion, says:

“When the parties to an agreement have put into it a provision for the payment, in case of a breach, of a certain sum of money, which is truly liquidated damages, and not a penalty; in other words, when the contract stipulates for one of two things in the alternative, or on the one side the doing or not doing of certain acts, and on the other the payment of a certain sum in money in lieu thereof, equity will not interfere, but will leave the party to his remedy of damages at law (*Shiell v. McNitt*, 9 Paige, 101; *Skinner v. Dayton*, 2 Johns. Ch., 226, 235; Pomeroy Eq. Jurisp., Section 447). The case turns on the constructions to be given to the contract. If the defendant has agreed not to engage in the business of dentistry in Hartford for the term of ten years under a penalty of \$1,000 for a breach, equity will restrain him; for a penalty is merely a security for the performance of the contract, and is not the price for doing what a man has expressly agreed not to do. But if, on the other hand, the true interpretation of the agreement is that the \$1,000 was intended to be liquidated damages, then the court should not interfere by injunction, because the plaintiff has his complete remedy at law, and this mainly on the ground of the nature of the contract.

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And then the learned chief-justice, in speaking of the contract, says:

“The contract presents an alternative. It virtually says to the defendant, ‘If you enter into the business of dentistry at Hartford after the termination of this agreement, you must pay the plaintiff the damages named.’ The language used indicates this thought, and there is nothing in the relation of the parties, or in the business of dentistry, nor in the surrounding circumstances, to indicate otherwise.”

The syllabus of the case is as follows:

“Injunction will not issue to compel the defendant not to exercise his trade or business in a city or in fifteen miles thereof, he having agreed that he would not so exercise it, and that if he did, he would pay complainant \$1,000, and it further appearing that he has not paid such sum, and is insolvent.”

We see nothing in this case in conflict with the views that we have expressed or the authorities referred to. Indeed the decision is in full accord with the rule laid down by Lord Chancellor Sudgen in *French v. Macale, supra*, which is the leading case upon the subject.

The second question made needs but little consideration as it seems to be well settled in this state that such a contract will be enforced. The defendant was a jeweler, optician and watch-maker; his remaining out of business would not generally interfere with competition in that trade and could not therefore affect public policy. The restraint was partial, only applying to one county, and to continue only so long as plaintiff should remain in business at the village of Kent. Therefore it was not unreasonable or oppressive. There was also a valuable consideration. In *Lange v. Werk*, 2 Ohio St., 519, it is held:

“Before such contract can be enforced, it must appear from the pleadings and proofs: 1. That the restraint is partial. 2. Founded upon a valuable consideration; and, 3. That the contract is reasonable and not oppressive.”

Furthermore the very effect of the clause was to provide against the defendant engaging in business where he had es-

tablished a special reputation as an expert in his particular trade which, as shown by the testimony, included all or nearly all of Portage county.

In *Morgan v. Perhamus*, 36 Ohio St., 517, it is held:

“M, a married woman, engaged in carrying on the business of millinery and dress-making with her separate property, and on her own account, in the town of F, sold her stock of goods, together with the good will of the business, and engaged not to carry on the business at any time in the future at the town of F, or at any place within such distance of said town as would interfere with such business, whether the same was carried on by the purchasers or their successors: *Held*: That such agreement in equity is binding, and that, in an action brought by the successors of the purchaser, M will be enjoined from carrying on such business in violation of the agreement.”

Finding and decree in favor of plaintiff, enjoining the defendant as prayed for in the petition.

Stuart & Stuart, for plaintiff.

Siddall & Rockwell, for defendant.

FORFEITURE OF STREET RAILWAY GRANTS.

[Circuit Court of Lucas County.]

THE CITY OF TOLEDO V. THE TOLEDO RAILWAY & LIGHT CO.

Decided, October 3, 1903.

Street Railways—Franchise for—Time Limit for Building the Road—Conditions Precedent and Subsequent—What Constitutes Completion of a "Fill"—Forfeiture of Grant—Suit for, Must be Based Upon Acton of Council—Provisions for, Strictly Construed Against the Municipality—Waiver of Conditions for—Damages—Injunction.

A street railway grant provided that the road should be built and in operation within six months from the time the city had completed certain grading; otherwise all rights and privileges thereby granted should be forfeited. A large part of the road was built and put in operation. Ten years later the city caused the stipulated grading to be done, which was immediately accepted and paid for. During the winter months following the "fill" thus made settled from six inches to one foot. It was leveled up, and the construction of the road begun, when work was stopped by the mayor and police on the ground that the time limit had expired, and suit was brought to enjoin further work and forfeit the franchise as to this part of the route. *Held:*

1. That the completion of the grading contemplated by the ordinance granting the franchise should date, not from the acceptance of and payment for the work, but from the date of its being put in such condition that a street railway could safely be built upon it.
2. The rule requiring that forfeitures be strictly construed against those for whose benefit they are provided, together with the entire failure of the city to show that any damages have been suffered by reason of the delay, and the further fact that if any part of the franchise is to be forfeited, it must be forfeited as a whole, including the portion of the road which was built ten years before the city did the stipulated grading, forbids the granting of the relief asked.
3. Moreover a suit for the forfeiture of such a franchise will not lie, unless based upon a determination by the city council that a forfeiture should be declared.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action comes into this court on appeal. It was brought by the City of Toledo to enjoin the defendant from

constructing a piece of railroad track, about a quarter of a mile long, on Central avenue in this city, and to have declared a forfeiture of all the rights, franchises and privileges of the street railway company in that street, for the purpose of building, maintaining and operating a street railroad. The claim of the plaintiff is, as set forth in the petition, that on the 14th day of December, 1901, the common council of the City of Toledo passed an ordinance giving and granting to The Metropolitan Street Railway Company, its successors or assigns (of which the defendant in this action is the successor), the right to construct, maintain and operate the same over Central avenue from Cherry street to the westerly limits of the City of Toledo, being a distance of about one mile, and running between Cherry street and Collingwood avenue a portion of the way. The ordinance, as set forth in the petition, required that the street railway company should complete the construction of the street railroad and have it in operation by September 1, 1902; but it contained further provision that the City of Toledo was to grade and fill in that portion of the route that lay between Cherry street and Collingwood avenue—which was lower than the grade line, there being a ravine at that point which it was necessary to fill in and grade before the street railroad could be properly constructed. And it is set forth in the petition that the ordinance provided that the city was to do this work of filling in and grading Central avenue, and that if the city did not complete the work of grading and filling in within the time limited, to-wit, by the first of September, 1902, the time limit for the building of the street railroad, then that the railroad should be built and its operation commenced within six months after the city completed the filling and grading of this portion of the route. And the petition sets forth and complains that the street railway company did not build its track on this part of the route lying between Cherry street and Collingwood avenue, within six months after the city had completed its fillings in and grading, but that on the 7th day of July, 1901, it had commenced the work of laying its tracks and building a street railroad over this part of its route, the petition alleging that the city had completed its work of filling in and grading more than six months prior to the first

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day of July, 1901; and therefore it is claimed by the city in its petition that the street railway company has forfeited all of its rights and franchises in this portion of the route lying between Cherry street and Collingwood avenue, and the petition asks that such forfeiture be declared and asks that the street railway company be enjoined from building and constructing said railroad at that point.

The ordinance passed by the City of Toledo on the 14th day of December, 1891, contained substantially the provisions set forth in the petition, and, that I may be exact, I will quote from the ordinance this provision:

“Section 4. The work of the construction of said extension of said street railway shall be under the direction of the city civil engineer, and shall be commenced as soon as practicable after the passage of this ordinance, and shall be completed and in operation on or before September 1, 1892; Provided, that work thereon shall not be required until after said Central avenue is graded to the established grade between Cherry street and Collingwood avenue, and in case the same is not graded and the road herein authorized to be constructed is not completed within the date named, then said extension shall be constructed and put in operation within six months from the completion of said grading.”

And Section 6 of said ordinance provides:

“Section 6. If said company, its successors or assigns, shall fail or refuse to comply with the conditions of this ordinance, or with an ordinance entitled ‘An ordinance to grant to the Metropolitan Street Railway Company the right to reconstruct its tracks and extend its charter,’ passed March 11th, 1889, or the general ordinances of the city of Toledo regulating the operation of street railways, and amendments existing or hereafter made thereto, so far as the same are applicable and not inconsistent with the conditions of this ordinance, the rights and privileges hereby granted shall be deemed forfeited and the City of Toledo shall have the right to re-enter and take possession of the same to the exclusion of said company. Passed December 14, 1891.”

The grading of this portion of the street was not done by the city for nearly ten years after the passage of the ordinance, but was let by contract in the year 1901, and the work was

accepted by the city council on the 11th day of November, 1901, by formal resolution of the council, and the contractor ordered paid. So that more than six months had expired from the time this work was accepted by the city when the street railway company began its work of constructing the street railroad on this part of the route, to-wit, on or about the 7th of July in the following year, 1902. It is claimed by the city that on account of this failure to comply with this provision of the ordinance, that the whole of this road or route—about one mile in length—should be completed and in operation within six months after this filling and grading had been done; that all of the company's rights as to this part of the road have been forfeited.

It is claimed by the defense that this is not true as a matter of law or fact; and, further, that no forfeiture has ever been declared by the city; also as a matter of fact, notwithstanding its acceptance by the council, that this work of filling and grading was not done by the city and finished and completed within six months before the commencement of this work by the railway company. Evidence was offered, both by the city and by the defendant.

It seems that prior to July, 1902, the street railway company had built and completed and had under operation about three-fourths of this entire route—about three-quarters of a mile. The company had not waited for the city to do this filling and grading before commencing the building of the street railroad, and, within probably six months after the ordinance was passed, the entire route as contemplated by this ordinance had been built, except that portion which could not be built on account of the condition of this grading, and cars had been maintained and operated upon this portion of the road for nearly ten years before this grading was done by the city. After the grading had been completed and finished, which the railway company claims was in fact early in the spring of 1902, the company, in the fore part of July, commenced the work of building the street railway at this point, but were stopped by the mayor of the city and the police, and the work of building a railroad there was prevented by policemen on the ground, for a period of about ten days, until this action was commenced by the city solicitor, to have

determined in a court of equity the rights of the respective parties.

An issue of fact, then, in the case is: whether the city had finished and completed its work of filling and grading as contemplated by this ordinance, more than six months before the work was commenced by the street railway company over this part of the route?

Several witnesses were called by the plaintiff, and some by the defendant. The Assistant City Engineer, Mr. Ridenour, was called by the city, and testified that it was necessary after such work as this had been done that it be given considerable time to settle before it would be feasible to lay a pavement upon the street, or to build a street railroad upon it. This grading was accepted by the city in November, 1901. He testified that as a rule they gave some six months for settling before they did such a thing as to pave a street, and that it should be allowed an entire winter for settling, in his judgment, and that before a street railroad should be built there should be a solid sub-structure.

Mr. Miller, who was an inspector in the employ of the city during a portion of the time that this grading was going on, testified that he saw it in the spring of 1902; that there were holes in it and that it had settled in spots. It was shown on the part of the defense that complaints were made by some of the citizens who resided upon the line of the street, that the grading had not been properly done.

Mr. Sheehan, the contractor who did the work for the city, was called as a witness and testified that he filled in with almost anything that he could get—sand, quicksand, and the roots of trees, rubbish, street sweepings—and anything that would fill a hole; that when the engineer, or the proper officer, pronounced the work up to grade it was accepted by the council and he got his pay, but that the grading had no sooner got up to the grade line than it began to settle, and it settled from one foot to two feet at various places during the winter months, and he testified that it was a usual and ordinary thing for such work to settle in the six months that follow the doing of the work, so that it was necessary to go over it again and bring it up to the grade line,

and he testified that the street commissioner did work upon this street during the winter, filling it up here and there as it settled; and, after it had been accepted by the council, he testified that he went back and filled in at places, and did work in that way in the latter part of November; and he says that the commissioner filled in some late in the winter; that it had settled at the sewer connection points, and he says that the street was at that time below grade probably from six inches to fifteen inches at different places, and that in the spring of that year it was from six inches to one foot below grade.

There was other testimony on this question, and we find that the overwhelming weight of the evidence is that this work of grading in question was not completed and finished as contemplated by this ordinance, until the spring of 1902, a short time before this work was commenced by the street railroad company.

The acceptance of the work by the city council, by resolution, and the direction to pay the contractor, would not bind the street railway company, the other party to the contract made by the ordinance. The ordinance imposed upon the city the duty and the burden of filling this in to the grade line and completing it, and it gave the street railway company the privilege of waiting six months after that filling was completed, or waiting so long as they pleased, so that the railroad was completed and in operation within six months after the grading was finished by the city, the ordinance providing "that work thereon shall not be required until after said Central avenue is graded to the established grade between Cherry street and Collingwood avenue, and in case the same is not graded and the road herein authorized is not completed within the date named, then said extension shall be constructed and put in operation within six months after the completion of said grading."

We hold that that language in the ordinance requiring the city to complete this grading, means that it shall be in fact completed—not that it shall be accepted by the city council, but that it shall be put in such condition as that it would be proper and safe to build a street railroad upon it. This was part of the work which the city was to perform in the construction of this improvement and means of travel in the city,

and for which the street railway company had been given this grant by the ordinance. The city was required to do this filling in such a way that it would be safe and practicable to construct a street railroad upon it, and when the filling was done with quicksand and roots and street sweepings, and with any rubbish, as the contractor testified that he could get, the city had not finished the work as contemplated by the ordinance, and it began to settle immediately, and settled from six inches to a foot and two feet, in different places, as shown by the evidence. It was conclusively shown that this part of the street on Central avenue between Cherry street and Collingwood avenue was not in a fit condition to build and construct a railroad upon in the fall or winter of 1901-2, and it was not in such condition until the spring of 1902, a very short time before the work of building the railroad was commenced by the street railway company.

To warrant a court in declaring a forfeiture of the rights and privileges granted to a company under an ordinance of this kind, the evidence must be clear and conclusive that the company has violated the provisions of the ordinance in such a manner as to warrant a forfeiture; a court would not forfeit the privileges so granted or take from the company the right to build or finish building a street railroad upon any doubtful case. The authorities upon this question are numerous.

It should be noted that the city does not ask for the forfeiture of this entire grant and of the rights and privileges extending along this entire route, but only of a portion of the line. There is no provision in the ordinance for a forfeiture of a portion of the grant—the only provision is for a forfeiture of all the rights and franchises. The city has no authority under this ordinance to select such a portion of the route as it sees fit and ask to have a forfeiture declared upon it; if it is entitled to a forfeiture, it is for all. Provisions of forfeiture are to be strictly construed, and have been from time immemorial—from Shylock's case and before, down to the present time.

There is no provision in the ordinance for a partial forfeiture. Forfeitures are not favored by courts, and especially where it appears that the provision of forfeiture is put into a contract, agreement or franchise only to secure the performance of the

work, and forfeiture of the property or of the rights of a person, natural or artificial, because of a slight failure to perform all the provisions of the contract, is not favored by the courts, and where compensation may be had in lieu of forfeiture, a court of equity will grant that instead. As the Supreme Court of this state has said in 33 O. S., 459 (*The Union Central Life Ins. Co. v. Pottker*):

“Forfeitures are odious, and there must be no cast of management or trickery to intrap a party into a forfeiture.”

And in 53 O. S., 558 (*Webster et al v. Dwelling House Ins. Co.*):

“Provisions for forfeiture are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced.

“If it be left in doubt, in view of the terms of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction will be adopted which is most beneficial to the promisee.”

And on page 563 of the opinion:

“Relief against forfeitures is matter of equitable cognizance; but rules applicable to the subject are resorted to in courts of law, and there seems no good reason why the principles which govern courts of equity should not be available in a suit at law where the facts make such cognizance necessary to the ends of justice.

“A primal rule is that forfeitures are not favored either in equity or at law; indeed, it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.”

It has been held by some courts that where there is in an ordinance a condition precedent, where something is required to be done before a right can vest, that the courts can not relieve against that. But it has been held by the Supreme Court of this state that a condition of the kind involved here is to be regarded as a condition subsequent. The right to build the road

was vested in the company when the ordinance was passed; it had built its road upon three-quarters of the route and was operating it, and this condition should be regarded as a condition subsequent. The Supreme Court say in 43 O. S., 46 (*State, ex rel Silsbee, v. Boyce*):

“Where the conditions of the ordinance do not clearly appear to be conditions precedent, they will be regarded as conditions subsequent.”

No action has ever been taken by the city council to declare a forfeiture, or by any other duly authorized officer of the city. The city never complained that the railway company had not completed this part of the work within the time limit, until this suit was commenced, and not then until after the work was stopped by the mayor and police force. The city council has never authorized or directed the city solicitor to commence this action and ask that a forfeiture be declared. Whether the city solicitor had authority to begin such an action without a resolution passed by the city council, we need not now determine; but I speak of this fact as in line with what I have said—that the city has not done anything to indicate a desire for the forfeiture of these rights of the railway company. In the case in the 43 O. S. (*supra*), the court say, on page 52:

“The solicitor is a public officer elected by the people, and when required so to do by resolution of the council, he shall prosecute or defend for and in behalf of the corporation, except in certain cases.” (Rev. Stats., 1777).

On the question of forfeitures, in Pomeroy's Equity Jurisprudence, Section 381, Vol. 1, the author says, on page 415:

“The general doctrine was finally settled that wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance, or enjoyment, as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor party from such penalty or forfeiture whenever the actual damages sustained by the creditor party can be adequately compensated. The application of the

principle in such cases, and the relief against penalties or forfeitures, must always depend upon the question whether compensation can or can not be made."

In this case there is no complaint that the city is damaged. If it were true that a few weeks had gone by beyond the time limit in the ordinance, there is no claim made that the city has been damaged in the slightest respect by this failure on the part of the street railway company to complete this work within the exact time limit. There is no complaint made by any citizen of the city of Toledo that he has been damaged. No one is requesting that any officer of the city, the city solicitor or the council, or any other body or officer, go into court and ask to have a forfeiture declared. The purpose and object of the city council and the railway company in entering into this contract by ordinance, was to have a railroad built in the streets of the city for the benefit of the street railroad company and also of the people of the city, in order that they might have additional transportation facilities throughout the city. The purpose was not to get hold of and destroy the property of the street railway company, and the fact that the road was not completed exactly within the time fixed, if that were true, does not materially affect the rights of the city or damage in any appreciable amount the city or any of the citizens thereof. The city had delayed for ten years the completion of this work of grading. The street railway company had built the rest of the road between nine and ten years before they were required to build it and it would be clearly contrary to both law and equity and a violation of the fundamental principles of right and justice to declare a forfeiture of this small portion of the route, on the ground that it was not completed within the exact time fixed in the ordinance.

A case in Illinois is in point, 73 Ills., 541 (*The Chicago City Railway Company v. The People, ex rel Allan C. Story*), where the Supreme Court of Illinois say:

"Where a railway company was authorized by its charter to construct and maintain a railway in a certain part of the city of Chicago, over and along such streets, etc., as the common council had or might authorize, in such manner and upon such

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terms and conditions as the common council had or might contract with the company, and, by ordinance of the city, license was given to lay a single track along a certain street half the way within the time required: *Held*: That the common council had the right and power to waive the condition as to the time for completing the same, it being a provision in favor of the city to secure the public interests."

And on page 549 of the opinion, the court say:

"Courts proceed with great caution in proceedings which have for their object the forfeiture of corporate franchises. It is not every non-performance of the condition in the act of incorporation, or every misuser, that will forfeit the grant. A substantial performance according to the intent of the charter is all that is required."

Another case upon the proposition that the city had the power to waive this provision of the ordinance, is found in 5 Ohio Circuit Court Reports, page 319 (*The Hamilton Street Ry. & Electric Co. v. The Hamilton, etc., Transit Co.*), the Circuit Court of Hamilton County. The opinion is by Judge Smith, in which, speaking for the court, he said:

"Nor do we think that we should in this case, at the instance of the defendants, determine or adjudicate whether for any reason the plaintiff company has forfeited the right given to it by the ordinance, to construct and operate its road. This also, in the first instance, is a matter for the consideration and decision of the city council which (if the forfeiture has occurred) may insist upon or waive it."

As I have said in this case there has been no act of the council looking towards a forfeiture of this franchise. The question is still open whether the city desires to forfeit it, and before the property of the railroad company is declared forfeited and taken from it and its tracks torn from the streets, the company has a right to be heard before the council.

In a case found in 13 Ohio Federal Decisions, pages 307-312, opinion by Judge Taft, this is said:

"The ordinance would seem to vest in the village the power to act and remove the tracks from the streets if the council concluded that the conditions had not been complied with." *Stewart v. Ashtabula*, 13 Ohio Fed. Dec., 307-312 (98 Fed. Rep., 516, 520).

It seems to us very clear that the city council is the proper body to determine whether the city desires that these rights and privileges shall be forfeited or not, or whether a slight failure on the part of the street railroad company in the matter of time in doing this work shall be waived. We are very clear that under the evidence offered here no court of equity would declare a forfeiture of these rights or enjoin the street railroad company from building and constructing its road upon this street. On the contrary, we find from the evidence in the case that the street railroad company has complied with the conditions imposed upon it; that it commenced the work within the time fixed and was proceeding properly and in order and according to law to fulfill its part of the ordinance when it was stopped.

The petition of the plaintiff will be dismissed at its cost, and injunction denied.

U. G. Denman, City Solicitor, for plaintiff.

Smith & Baker, for defendant.

LIABILITY OF MUNICIPALITY FOR DEFECTIVE SIDEWALK.

[Circuit Court of Lucas County.]

ADELIA BLOOM v. THE CITY OF TOLEDO.

Decided, October 3, 1903.

Sidewalks—Rendered Unsafe by Snow and Ice—City Liable Where Ice Accumulates as a Result of a Defect in the Walk.

For the presence of snow and ice upon the sidewalk, which comes today and is gone tomorrow, the municipality is not liable; but when the danger to those using the walk arises from a defect in the walk itself, as from a sunken stone where water collects and freezes, the rule is different, and liability for an injury on account of such defect arises. 19 C. C., 418, followed and approved.

HAYNES, J.; HULL, J., and PARKER, J., concur.

In this case a petition in error is filed to reverse the action of the court of common pleas. It is a case in which Adelia Bloom

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is plaintiff and the City of Toledo defendant. It appears from the evidence in the case—briefly—that there existed at the time of the occurrences complained of, in the sidewalk upon the easterly or northeasterly side of Lagrange street, at or near the junction of that street with Erie street in this city, a depression in the sidewalk, wherein in times of rain or melting snows water would accumulate and stand, and was liable to and did become frozen and slippery, and that this state of affairs had existed for a considerable time prior to the 1st of February, 1902, at which time, in the evening, the plaintiff in passing along that street, with her husband, stepped upon this icy spot, slipped and fell, receiving severe injuries from which she was laid up for a long time, and from which she was for a long time disabled.

Upon the trial of the case, testimony having been given to establish these facts, the court directed a verdict for defendant, the city of Toledo, and thereupon a petition in error is prosecuted to this court for the purpose of reversing the action of the court below.

The testimony upon the trial showed that there was this depression. It seemed that at one end of the stone it had become sunken lower than the rest of the sidewalk, and therefore it retained the water which fell during rains, or the water which came from the melting of snows, or the water which ran into it from the adjacent property.

We suppose the theory of the trial court was that this obstruction was of such a nature that the city was not liable, and the line of argument is, that in regard to these minor obstructions, arising from snow and ice upon the street—liable to come today and be gone tomorrow, that there can be no liability upon the part of the city. I do not propose to go into a discussion of all the cases that have been cited in regard to the matter, but I simply point out this fact, that in all these cases it would seem that the court confines its decisions—in cases where there are no defects in the sidewalks, along ordinary sidewalks there may become, by reason of snow storms or sleet storms, ice in a very few minutes, and there may be accumulations of water that follow a rain or from snow that has melted within a very short

time—and the courts have held that, in cases of that kind, that the city is not liable. But when cases arise from defect in a sidewalk, and the sidewalk itself becomes the source of the evil, the rule is different—and we think it should be different. It is true that this unevenness covered a very small space; but it is in the sidewalk—which is not more than four or five feet wide—and it is certain that it was large enough so that a person could receive a very severe injury by stepping upon a spot of that kind, and it certainly should be looked after and remedied just as much as though half of a plank were gone; it is just that class of defects which require the attention of the city, and too often, I fear, just that class of cases which are overlooked by the officers of the city.

After a full discussion of this case we refer to the case of *Russell v. The City of Toledo*, decided in the January Term, 1899, by this court, in which Judge King delivered the opinion, and in which he discusses these questions very fully and very clearly. This opinion will be found in the 19 Circuit Court Reports, page 418. I will simply say that in deciding this case we follow the law as laid down in the decision of that case and affirm it and abide by it. The question whether this defect was a matter which was dangerous or not, is a matter which should have been submitted to a jury and is not a question of law that the court, under the circumstances, should take from the jury. The verdict will be set aside and the judgment reversed and the cause remanded for a new trial.

Peter Emslie, for plaintiff.

M. R. Brailey, for the defendant.

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NUISANCES.

[Circuit Court of Cuyahoga County.]

THE STANDARD BAG & PAPER COMPANY V. THE CITY OF CLEVELAND.

Decided, November 30, 1903.

Jurisdiction in Equity—Action Does Not Abate Upon Transfer of Plaintiff's Title, When—Knowledge of Plans and Silence Alone not Such Laches as to Estop—Public Nuisance by Plaintiff No Answer to Private Nuisance by Defendant, When—Prescription as Defense in Nuisance Case—No Joint Liability for Several Nuisances—When Damages Computed to, in Equitable Action.

1. In an action to restrain the commission of a nuisance and to recover damages therefor, equity has jurisdiction and damages may be awarded, even if the court for some reason considers that it will not grant an injunction.
2. Such action does not abate upon transfer after suit brought of plaintiff's title to the property damaged by continuance of the nuisance, if plaintiff's grantee participates in the trial and ratifies its prosecution.
3. Mere knowledge that a city is constructing a system of sewers at large expense which may cast filth upon one's land, and failure to protest, when it does not appear that the plaintiff in any way encouraged the adoption of the system, or induced the city to so direct its sewers, do not work an estoppel or constitute such laches as to bar a recovery in an action against the city for maintaining a nuisance.
4. In an action against a city by the proprietor of land within it through which runs a stream, to restrain the city from polluting the stream to his special damage, it is no defense that the proprietor also pollutes the stream, contributing to a public nuisance, no special damage to the city as a lower riparian proprietor being shown.
5. Prescriptive right to flow sewage into a stream can be maintained as a defense only for the quantity of sewage originating the right, and not for any increase thereof.
6. Where a city and individuals are casting filth into a stream to the damage of a lower riparian proprietor, the city can be held liable only for the *quantum* of pollution caused by itself, and not for that caused by individuals though they are situated within the limits of the city.

7. In an equitable action to enjoin a nuisance and for damages, the damages if allowed should be computed to the first day of the trial term.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Appeal by defendant.

This is an action tried to the court on appeal from the common pleas court, the plaintiff alleging that it has been specially damaged in its business of making paper, by the acts of the city of Cleveland in emptying certain sewers into Kingsbury run, a natural water-course flowing through plaintiff's premises.

The petition sets forth that plaintiff in its business formerly used the water from the run in large quantities, but that in 1898 the pollution of the stream from said sewers became so great that it was compelled to largely discontinue the use of said water and to purchase it from the city, whereby it was greatly damaged, and for which damages it asks judgment, and further prays for an injunction restraining the city from continuing to discharge its sewers into said run.

The city has interposed certain defenses which are hereinafter considered.

A preliminary inquiry must be made as to whether this action can be maintained in equity.

It is well settled in Ohio that a municipal corporation which causes its sewage to be emptied into a natural water-course, thereby creating a nuisance inflicting special and substantial damages to a riparian proprietor, is liable in an action for the damages so sustained. *City of Mansfield v. Balliett*, 65 O. S., 451; *City of Mansfield v. Hunt*, 19 C. C., 488; *Rhodes v. City of Cleveland*, 10 Ohio, 160.

The jurisdiction of courts of law over cases of private nuisance is not, however, exclusive.

It was said in the case of *Fox v. City of Fostoria*, 14 C. C., 471, 481:

"It may be conceded plaintiff might bring and maintain suits for damages in every instance where he suffers damages and might recover. But inasmuch as the obstruction here is

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permanent, entailing damages continuously and necessitating frequent and continuous litigation with uncertain results and certain costs, expense and trouble, we suggest that the remedy at law is not adequate."

While equity has assumed jurisdiction of nuisance cases for many reasons, among which may be mentioned the following: because compensatory relief is insufficient and preventative remedy is necessary to the ends of justice; because the cause of action is continuous and the nature of the damage is such as not to be susceptible of proper assessment by a jury; and because the damages are too small to warrant a judgment—perhaps the principal reason why equity takes jurisdiction in cases of continuing nuisance is because thereby multiplicity of suits is avoided.

The prevention of a multiplicity of suits is a very favored object with courts of equity and perhaps more favored in Ohio than in many other states. The extent to which the doctrine has been carried is illustrated by the case of *Blair v. Newbegin*, 65 O. S., 425.

Plaintiff's petition and proof bring it squarely within this equity jurisdiction. We have in this case a continuing nuisance which is causing special damage to the plaintiff in its business; as often as a suit at law may be brought to assess such damages a new cause of action arises out of the same relation of the parties and continues until another such suit may be brought. Hence arises a multiplicity of suits. Again, compensatory relief under the circumstances of this case is certainly insufficient and preventive relief is prayed for; whether or not, in view of the situation of the defendant, preventive relief will be granted, does not affect the jurisdiction of the court. Such is the doctrine laid down by Pomeroy on Remedies and Remedial Rights, Section 78:

"When the plaintiff possesses or supposes himself to possess primary rights, both legal and equitable, arising from the same subject matter or transaction, and avers the necessary facts in his pleadings and prays for both the remedies corresponding to the different rights, but on the trial fails to establish his equitable cause of action, his action should not therefore be dismissed."

This doctrine was followed in the case of *Lynch v. Elevated R. R.*, 129 N. Y., 274, and many similar cases might be cited, so that we conclude that in an action to restrain the commission of a nuisance and to recover damages therefor, equity has jurisdiction and damages may be awarded even if the court for some reason considers that it will not grant an injunction.

Without reciting all the facts in this case, which would be more properly set out in a finding of facts than in an opinion, the general rules above set forth, unless there is such merit it is sufficient to say that plaintiff has made out a case under in one or more of the several special defenses interposed by the city as to preclude any relief for plaintiff.

Let us examine these special defenses.

1. It is admitted that after the commencement of this action in the court below, plaintiff parted with its title and the possession of its property on Kingsbury run, and from this fact it is argued that it thereby divested this court of jurisdiction of this cause, and that plaintiff must be remitted to its action at law; that equity can not raise its arm to protect a party in the enjoyment of something that party has lost by its own voluntary act.

In this court, however, as well as in the court below, the grantee of plaintiff and present owner of the property appeared at the trial of the case, ratified its prosecution by the plaintiff and participated in the trial.

Plaintiff claims that Section 5012, Revised Statutes, applies, and that no duty rests upon it to have any affirmative entry made by the court regarding the transfer of title. That the suit is *lis pendens* and its determination binds the actual owner. That if the defendant for any reason desires substitution or joinder, it should ask for it.

We think plaintiff is right.

Section 5012, Revised Statutes, after providing that actions shall not abate on account of the marriage of a female party or upon the disability of a party, reads:

“And upon any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him.”

We think this action may continue in the name of the original party. Of course, the new owner of the property will be bound by any order made in this case, though it has made no application for substitution. The statute fits the case exactly, and in this conclusion we are not without authority to sustain us.

In the case of *Stufflebeem v. Adelsbach*, 135 Cal., 221, being an injunction suit to restrain interference with a ditch, a similar statute was similarly applied.

In the case of *McGean v. M. R. R. Co.*, 133 N. Y., 9, an action to restrain the operation and maintenance of defendant's elevated railway on a street in front of plaintiff's premises and to recover damages, a similar construction was put upon a similar statute.

2. From the fact that the evidence shows that the president of the plaintiff company was present and had knowledge of the system of sewers which was being constructed by the city at large expense, at the time of their construction; that he at that time made no protest; that he made no inquiry at the city hall to ascertain the extent of the contemplated discharge of sewage and was silent, it is argued that by his conduct he acquiesced in the construction of said sewers, and that therefore plaintiff should be estopped from maintaining this action.

We do not think the facts in the case warrant the application of the doctrine of estoppel. In the language of the opinion in *Chapman v. Rochester*, 110 N. Y., 273:

"It does not appear that the plaintiff in any way encouraged the adoption of that system or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises."

See also *Cilly v. City of Cincinnati* (Hamilton Co. District Court), 2 W. L. B., 135, and *Fox v. City of Fostoria*, 14 C. C., 471.

3. The defense of laches pleaded in the second amended answer is based upon the same facts as the defense of estoppel, and fails for the same reason that that defense fails.

4. Defendant urges that plaintiff should have no standing in a court of equity because for twenty years it has been doing

the very thing which it complains that the city is doing—in other words, that plaintiff's hands are not clean.

It was shown in the evidence that below the place where plaintiff has been drawing water from Kingsbury run it has an effluent that carries back into the run a large volume of water holding in suspension and solution the dirt, coloring matter and chemicals coming from the working of rags and paper used in its business, and also some sewage. The city says it has a right to make this defense because it is itself a lower riparian proprietor as well as an upper proprietor, and the subject matter of this suit is the pollution of Kingsbury run.

While the city may be a lower riparian proprietor, it does not appear that it has ever complained of the acts of plaintiff in polluting the stream, nor has it shown or attempted to show any damage to it therefrom. The subject of this suit is not alone the polluting of Kingsbury run but the special damage resulting therefrom.

It is not a public nuisance which plaintiff, as one of the public, seeks to abate, but a private nuisance causing it special damage. The defendant city may complain that plaintiff is causing a public nuisance but that matter is not an issue in this case.

5. Defendant pleads a prescriptive right to use Kingsbury run for sewage purposes. This would be a good defense if proved, subject to the limitations usually put upon such prescriptive rights by the courts and set forth in 21 Am. & Eng. Enc. of Law, 735, as follows:

“The right of prescription is restricted to and measured by the adverse user that originates it; it must be shown that the user, during the entire period by which the right is fixed, has produced an injury of the same grade and character as that complained of. For any increased user causing material injury the right of prescription can not be set up as a defense.”

The facts in this case show that for more than twenty-one years defendant has used Kingsbury run for the disposal of a certain amount of sewage, but that such use has increased materially in the last few years. The amount of sewage that defendant has thus proved its right to throw into Kingsbury run can be ascertained from the facts and the matter will be

again adverted to when we come to the question of whether or not plaintiff has proved that it has been substantially damaged as claimed by it.

6. Defendant claims that plaintiff has not shown by a fair preponderance of the evidence that the city of Cleveland has caused the pollution that has rendered impossible the use of Kingsbury run in the manner that plaintiff was using it for mechanical purposes, but that it is just as fairly deducible from the evidence that others may have caused it, and that therefore defendant is not liable.

To sustain this proposition defendant's counsel cite as follows:

In 77 N. Y., 51, the Court of Appeals of the State of New York declared this rule (syllabus):

“Where different parties pollute a stream by the discharge of sewerage thrown by each from his own premises, and each acting separately and independently of the others, one of the number is not liable for all the injury sustained by another because of the nuisance thus created; each is liable only to the extent of the wrong committed by him.”

On page 53, the court said:

“The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act being several when it was committed, can not be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury; but that furnishes no reason why one tortfeasor should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among the different parties. So also proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a rule can not be upheld by any sound principle of law. The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tort

feasor should be liable for the acts of others with whom he is not acting in concert."

In 57 Penn St., 142, the court said:

"True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injuries that others do. This is bad logic and hard law. Without concert of action no just suit could be brought against the owners of all the collieries, and clearly this must be the test."

From these authorities we gather the rule to be that while one tortfeasor is not liable for the acts of others who have no association and do not act in concert with him, he is liable for his own acts. Whether in this case from the evidence we can determine the quantum of pollution caused by the city, is another matter to be taken up when we come to the question of damages. We agree with counsel for the city that for such quantum alone can the city be held liable.

7. Having come to the conclusion that plaintiff has proved its case and that defendant has shown no good reason why plaintiff should not recover, it remains to inquire whether, in fact, plaintiff has been materially damaged by the acts of the defendant, and if so, to what extent.

We think the evidence fully shows:

"That the plaintiff's mill was located forty years ago on the banks of the stream known as Kingsbury run in the city of Cleveland, and has ever since continuously been devoted to the manufacture of paper; that the mill site contains about nine acres of land; that the mill was operated up to April 20, 1898, under the ownership of The Cleveland Paper Company. From April 20, 1898, to February 1, 1903, under the ownership of The Standard Bag & Paper Company; and since February 1, 1903, the Cleveland-Akron Bag Company, grantee of the present plaintiff; that the capacity of the mill has greatly increased, there having been a one-tenth increase in its out-put since April 20, 1898; that the improvements on the property

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consists of extensive buildings, complicated and valuable machinery, requiring about 450 horse power now furnished by an engine of the compound condensing type, but prior to November, 1900, by three engines, one of which of about 300 horse power, was of the simple condensing type; that it required about the same amount of water for the condensation in the old engine that it does in the new; that the process of manufacture in the mill is the *customary one* requiring the free use of water for washing, beating and the preparation of raw material; that water is required for the operation of the paper machines, for use in the boilers and in the condenser; that the total requirements and actual use since 1898 have been one million gallons daily; that the owners have taken unusual pains to procure water adapted to their purpose from springs and other sources more or less permanent, and more or less remote from their manufacturing site, piping water for distances of one-half to two-thirds of a mile from their sources; that the plaintiff has available for use in its mill from springs and other sources of supply which do not involve a great expense, about four hundred thousand gallons of water daily, a portion of which is furnished them permissively and might be withdrawn at any time; that they are under the necessity of obtaining about six hundred thousand gallons of water daily from other sources; that in 1891, under a change of management, the demand for water for the first time was so increased beyond the former sources of supply as to necessitate procuring it elsewhere; the only available sources of supply were the water furnished by the city of Cleveland through its water works system, and the water flowing through the plaintiff's premises in the bed of Kingsbury run. An intake was then constructed from Kingsbury run, protected with a strainer and equipped with a filtration plant, and the water was conducted from the run into the pump and condenser of the engine. The product of the engine condenser was pumped into a tank on the hill side, being at a temperature of about 114 deg., Fah., and from there was all drawn down into the mill and used in the usual process of manufacture. These processes are such as to require the heating of the water. Prior to the year 1898 the plaintiff had found it necessary to occasionally clean filth from their screen at the intake and to take out and renew the filter and remove from it filth which had accumulated therein. This accumulation of filth both on the screen and in the filter and evidence of its existence in the water as used in the mill, rapidly increased during the year 1898, until in the fall of that year in November it became impossible to so remove from the water taken from Kingsbury run the foreign matter in it as to permit of its use. Since that time the product of the

condenser has of necessity been largely wasted, only one-sixth of it being available for the manufacture of paper, and that only in the earlier process for washing of extremely dirty material. The plaintiff was then obliged to and did heat the water in its washers and beaters by the induction thereto of live steam, and was obliged to and did use a larger amount of water from the only other reasonably available source of supply, namely, the water works of the city of Cleveland.

"It appears that the waste by the necessity of discharging and throwing away five-sixths of this heated water causes a direct money loss to the plaintiff, which has been ascertained to a reasonable certainty by the testimony of experts in the employ of the city and otherwise."

From the evidence we are also able to determine with reasonable certainty the quantity of sewage which the defendant has established its prescriptive right to carry into the run.

As to the quantum of pollution caused by others, including slaughter houses, oil refineries, rolling mills, foundries and other manufacturing establishments, some twenty-one in number, and about one hundred private water closets, all located near Kingsbury run, and emptying into it, the proof is not so definite, but we are able to estimate it with some degree of certainty.

Deducting from plaintiff's total damage occasioned by the necessity of throwing away five-sixths of its heated water, on account of the pollution of the water in the run, that portion of said damage resulting from prescriptive pollution, if it may be so called, and the pollution occasioned by others than the city, there remains the damage specially and directly caused by the city and for which it is liable. This damage we have computed and averaged by the month, beginning the computation April 20, 1898.

Defendant claims that damages should be computed only to the filing of the petition, July 6, 1900. Plaintiff contends that it is entitled to damages down to the day of trial in November, 1903.

It appears that in law cases for damages only, defendant is right, but it would seem to be otherwise where the damages are to be ascertained by a court of equity. As we have heretofore stated, one of the reasons why equity retains control of suits involving damages by trespass and nuisance, though preventive relief may be denied, is for the purpose of avoiding

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a multiplicity of suits and computation of damages to the trial day, is within the spirit of that purpose. Webb's Pollock on Torts, 519; *People v. Mould*, 37 Hun., 38; *Lynch v. Elevated R. R.*, 129 N. Y., 274.

In this state interest begins to run on judgments from the first day of the term at which they are rendered, and for that reason in this case we compute the damages to the first day of this term, October 19, 1903, instead of to the day of trial, and for the period of sixty-six months intervening between April 20, 1898, and the first day of this term of court, we find that by the acts of defendant the plaintiff has been damaged in the manner claimed by it in the sum of \$6,600.

An injunction, however, is refused. The granting of an injunction is always largely in the discretion of the court and the results to the public at large, now using the sewers we are asked to abate, must be considered. It appears from the proof that many private houses and manufacturing and mercantile establishments in the city of Cleveland are now connected with these sewers, which have been built at large expense. The health, as well as comfort and convenience, of thousands of citizens depends upon maintaining an outlet for the sewers, and no other outlet is practical or can be obtained under the present system of sewage disposal in use in the city.

Again, an injunction should restrain the city from emptying only part of said sewage into Kingsbury run, because the city has shown its prescriptive right to flow a certain amount of sewage thereinto and such a partial abatement would be impracticable and difficult to enforce.

Speaking for myself alone, I think the city should be compelled to install at the mouths of all sewers running into Kingsbury run and other runs, and thence into the Cuyahoga river, modern and scientific sanitary plants for the interception and reduction of all polluting matter effluent from such sewers, but the court is unwilling to put the city to such expense at this time.

Decree for plaintiff.

Norton T. Horr, for plaintiff.

Newton D. Baker, for defendant.

INNOCENT ALTERATION OF A PROMISSORY NOTE.

[Circuit Court of Lucas County.]

CHARLES E. TUCKER v. JOHN HENDRICKS.

Decided, October 31, 1903.

Promissory Note—Whether the Giving of, Constitutes Payment of a Claim—Is a Question for the Jury—Innocent Alteration of Note—Without Knowledge or Consent of the Payee—Does Not Defeat Action on the Original Claim—Testimony as to Intention.

1. Where a debtor attempts to satisfy a claim by the giving of his note for the amount thereof, which note was taken by the creditor, it is a question for the jury whether the note was accepted in payment of the claim.
2. Where intent is material, it is proper to ask a witness what his intention was with reference to the matter in hand.
3. A note drawing six per cent., given in satisfaction of a claim, was deposited by the payee in bank and placed to his credit. Some officer of the bank, with the understanding that between the bank and the payee the note was to draw eight per cent., the payee having obtained a loan from the bank at that rate, innocently wrote the words "8 per cent." upon the note. At maturity, payment of the note was refused because of the alteration, and suit was brought against the maker by the payee upon the original claim. *Held:* That the note having been innocently altered, without the knowledge or consent of the plaintiff, he had a right to pay the bank the amount of the note, take it back and bring an action upon the original claim.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought by the defendant in error, plaintiff below, against C. E. Tucker, plaintiff in error, to recover \$550, which the plaintiff claimed was due and owing to him for services that he had performed in and about the oil business in which Tucker was engaged. The defendant below by way of defense claimed that he had had a settlement with plaintiff and had given him his note for \$550 in full payment of this claim. The plaintiff admitted that he had taken this note for \$550 but averred that the Pemberville Banking Company, where he had deposited the note as collateral, without any fraudulent intent, altered the note by writing this in it: "Int. 8 per cent.," and

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that the defendant having refused to pay the note on account of its having been so altered when presented to him for collection by the bank; that the plaintiff paid the bank the amount of this note and took it back and brought suit against Tucker on his original indebtedness. Plaintiff claimed and averred that this alteration was made by the bank without any fraudulent intent or purpose, but inadvertently; that therefore his claim was in full force and effect although the note had been so altered that it could not be sued upon. The action against Tucker was tried to a court and jury and a verdict returned in favor of Hendricks for the full amount of his claim and judgment entered on the verdict, and this action was brought to reverse that judgment.

It is claimed by the plaintiff in error that the note having been altered by the bank in this manner after being deposited with it by the plaintiff, that no recovery can be had either upon the note or upon the original indebtedness. The evidence fairly shows that the plaintiff took the note to the bank and deposited it and it was placed to his credit in his account; that he at that time obtained a loan of about this amount from the bank, but the proceeds of this note went into his account in the bank, and it might perhaps be regarded as a discounted note, but just what the transaction ought to be called the witnesses disagree upon. The note as drawn drew six per cent. interest and ran for three months. The bank was not in the habit of loaning money at less than eight per cent. and made an arrangement with Hendricks whereby this note as between themselves was to draw eight per cent. interest, and thus make up the other two per cent., and some officer of the bank, it does not appear clearly who, knowing about this arrangement, wrote on the face of the note "Int. 8 per cent.," so as to have a memorandum of this contract, the officer of the bank being under the impression evidently that the note was, so far as they were concerned, to be regarded as an eight per cent. note. When the note became due the bank had it presented to Mr. Tucker and he refused to pay it on the ground that it had been altered. It was sent back to the bank and the bank notified Mr. Hendricks and he immediately took the note up, waiving any defense that

he might have or any complaint that he might have made that the bank had altered the note so that it could not be collected.

Tucker makes no claim that he has paid this claim; he admits that he owes \$550 for work and labor done for him in the oil fields. There is no pretense that that has been paid or extinguished in any way unless it was by the act of the person in the bank inadvertently writing a few letters upon his note.

We are of the opinion that the judgment of the court of common pleas was correct. The cashier of the bank testifies that it was altered without any fraudulent intent on his part, if he did it, and so far as his knowledge goes, without any fraudulent intent on the part of any officer of the bank. The whole transaction occurred in the way I have stated and appears to have been perfectly honest and without any intent to defraud Mr. Tucker in any manner whatever, but this was written on the face of the note, clearly with the impression that the bank had a right to make this memorandum. There was no intent to make an alteration against Mr. Tucker, or to enforce more than six per cent. against him.

The question involved is fully discussed in two cases found in the 4th O. S., the first one at page 60 (*Merrick v. Boury*):

“It is only by force of an agreement of the parties that the giving of an unsealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly; and the question whether there was such an agreement is one of fact to be determined by the jury.

“A vendee of goods, subsequently to the purchase, gave his note for the price, but it was not received as payment. Afterward the vendors, to whom it was payable, without any fraudulent purpose, and under an honest mistake of right, materially altered it. *Held*: That such alteration did not preclude a recovery upon the original cause of action, the precedent indebtedness.”

In the case at bar the claim was made that this note had been taken in payment. Plaintiff denied that it was taken in payment; and that was a question to submit to the jury, and it was found by them that it was not taken in payment. There is no conflict among the authorities that there must be an agreement

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that the note was taken in payment or something equivalent to that, otherwise it will not be held to have been so taken in payment.

Another case in 4 O. S. is found at page 530 (*Fullerton v. Sturges*) where the court say in the syllabus:

“The material alteration of a written instrument, made by a stranger, will not avoid it.”

The alteration in the case at bar was made by a stranger. But it is insisted by the plaintiff in error that the plaintiff below had sold and transferred the note to the bank and had no right to take it up. It may be true that the bank could not have compelled him to pay this note and take it up, the bank having altered it though innocently. He might have made that objection; he might have made that defense perhaps to any action which the bank might have brought against him; but he had a right to waive this and pay it, and if he took the note back Tucker can not complain; Tucker still owes the debt and it is incumbent upon him to pay it, and neither the defendant nor the bank have been guilty of any fraudulent act or have done anything with intent to injure Tucker in regard to this note.

One of the alleged errors complained of is that the court permitted the cashier to testify whether he had any intention to defraud or whether any of the officers of the bank, so far as he knew, had any intent to defraud in what was done. The question was asked him: “What is the fact as to whether there was any intention upon the part of your bank or of the officers to defraud any person in this matter, so far as you know?” Objection was made to that and overruled and exception taken. The answer of the witness was: “There was none.” It is always proper to ask a person what his intention was where that is material. There can be no fraud without intent. So far as any other officer of the bank was concerned, he simply testified that so far as he *knew* there was no fraudulent intent. This note having been altered without the knowledge or consent of the plaintiff and innocently altered, he had a right to bring his action upon the original indebtedness, which he properly did.

There were no errors committed upon the trial to the prejudice of defendant below; the verdict and judgment were correct and will be affirmed.

Gilbert Harmon, for plaintiff in error.

Shefler & Campbell, for defendant in error.

NEGLIGENCE.

[Circuit Court of Cuyahoga County.]

CITY OF CLEVELAND V. MICHAEL WOLF.

Decided, November 23, 1903.

Peremptory Order and Assumed Risk.

In a negligence case a general charge that: "If you find from the testimony that the plaintiff was ordered by one of the defendant's foremen to go into the trench at the time he was injured, he would not be negligent by reason of obeying such order, unless the danger of so doing was so obvious that a man of ordinary prudence would not have exposed himself to it," is misleading because it fails to define the kind of order which would relieve the plaintiff from the thought, care and scrutiny which he is bound to exercise while engaged in his ordinary duties, and a verdict for plaintiff following such charge should be set aside, where there was no evidence showing any peremptory order.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to court of common pleas.

On the 15th day of November, 1899, the City of Cleveland was engaged in laying water pipes on Kirtland street, in said city, which pipes were lowered into a trench dug for that purpose, by means of a derrick placed over said trench. Michael Wolf was on that day in the employ of said city, his duty being to assist in putting the pipes in proper position after they were lowered in said trench, and to make the joints water tight. While he was at the bottom of said trench engaged in the performance of his duties, he was injured by a portion of the west wall of said trench falling in upon him.

He brought suit against the city, alleging the weak and unsafe condition of said west wall at the particular place where

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he was injured where stood a telegraph pole, which he says the city knew, or by the exercise of ordinary care ought to have known, but which was to him unknown; the failure of the city to brace or timber said trench so as to prevent said wall from caving in; the failure of the city to notify him of the danger to which he was exposing himself while performing his duty. Another allegation of the petition I will give in its exact language:

"The defendant's foreman then in charge of the work, and whose orders and commands plaintiff was bound to obey, peremptorily ordered plaintiff to descend into said trench; * * * in obedience to defendant's order, by its agents and servants whom he was bound to obey, and not knowing the weak and dangerous condition of said trench wall at or near said pole, and having neither time nor opportunity to examine said wall before going into the trench, he descended into said trench at or near the socket end of the pipe, to which the pipe lowered as aforesaid was to be joined, and where plaintiff was to perform his duty; the trench near said socket was apparently in safe condition," etc.

The city answered, denying all averments of negligence on its part, and alleging contributory negligence on the part of Wolf.

Trial upon the issues resulted in a verdict and judgment for the plaintiff.

To reverse this judgment, petition in error has been filed in this court, alleging, among other things, that the charge of the trial judge was erroneous. Attention is called to the following part of the charge:

"It was the duty of the plaintiff in this action to exercise ordinary and reasonable care for his own safety, and if he failed to do so he would be negligent, and if such negligence on his part directly contributed to cause the injuries complained of, he can not recover in this action. But I say to you, that if you find from the testimony that the plaintiff was ordered by one of the defendant's foremen to go into the trench at the time he was injured, he would not be negligent by reason of obeying such order, unless the danger of so doing was so obvious that a man of ordinary prudence would not have exposed himself to it; and I further say to you, that unless the plaintiff knew, or by the exercise of ordinary care ought to have

known, that by reason of the character of the soil where the trench was dug, or by reason of the proximity of the telegraph pole to the ditch, there was danger of earth falling upon persons who might be in said trench, he is not chargeable with negligence in going into said trench at the time he went therein."

This part of the charge was warranted by the allegations of the petition above quoted (*Van Duzen Gas & Gasoline Engine Co. v. Schelies*, 61 O. S., 298), but it was not applicable under the evidence produced at the trial, and was, therefore, misleading.

There was no evidence produced showing that Wolf was peremptorily ordered into the trench at the time he was hurt. He himself says, upon cross-examination, that he always knew his duty and went down into the trench without being told, and that the pipe was put in the trench that day in the same way and in the usual manner of putting pipes in trenches. Wolf had worked for the city twelve or thirteen years, the first five or six years in digging water pipe trenches, and the remainder of the time in putting water pipes in position at the bottom of the trench and connecting them together, the very things he started to do when he was injured. While he says that one Henry Benedig, assistant foreman on the job, told him to go down into the trench, it appears Benedig preceded Wolf therein, and Wolf descended into the ditch at the proper time, in the usual manner, and to perform his usual and ordinary duties. It is apparent that Wolf, at the time he was injured, went into the ditch pursuant to the general orders all servants may be said to receive from their masters that they do their work at the proper time and place, and not pursuant to any special or peremptory orders given him at the time, or any orders different from the orders he had received many times a day for many years.

The reason the charge is misleading is because the trial judge failed to define the kind of order which would relieve Wolf from the thought, care and scrutiny which he was bound to exercise while engaged in his ordinary duties in an occupation which had in it certain elements of danger which he assumed when he engaged in it. It permitted the jury, having found

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that Wolf had general orders to go into the trench each time a pipe was lowered into it, to conclude that "he would not be negligent by reason of obeying *such* orders, unless the danger of so doing was so obvious that a man of ordinary prudence would not have exposed himself to it." Such can not be the law; it ignores the rule of assumed risk.

The proper rule in cases like this is set forth by the Supreme Court in the recent case of *The Northern Ohio Ry. Co. v. Seth Rigby*, OHIO LAW REPORTER, January 11, 1904, page 755. The latter case distinguishes the Van Duzen case above referred to, 61 O. S., 298.

Judgment reversed.

Newton D. Baker and *C. J. Estep*, for plaintiff in error.

Hermann Preusser, for defendant in error.

LEASE.

[Circuit Court of Cuyahoga County.]

OSCAR J. CAMPBELL ET AL V. MARY LUCK ET AL.

Decided, December 7, 1903.

Tenant Can Not Offset Cost of Repairs Against Rent, When.

Under a demise of lands containing no express covenant that they are suitable for the purpose, or to put and keep them in repair, upon a subsequent destruction of part of the premises by flood or the acts of third persons, the lessee can not recover of the lessor the cost of repairs made by the former.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to the court of common pleas.

The action in the court below was brought by Mary Luck and others as lessors, to recover from Hiram M. Brown, as lessee, and Oscar J. Campbell as his surety, for rent and taxes claimed to be due under a written lease.

A joint answer was filed by the lessee and his surety setting up two defenses.

The first defense was that as to the claim for the taxes the action was prematurely brought, being commenced on May 28,

1902, the last half of the taxes for 1901 not being due until June 20, 1902.

The second defense is in the nature of a counter-claim, it being alleged that during the term of the lease a fire occurred on the premises and water from the city fire engines present at the time washed away part of the demised premises, leaving a gorge about sixty feet wide and thirty feet deep across the front thereof, rendering the same inaccessible and useless to the lessee. That thereupon the lessee notified his landlord and demanded a cancellation of the lease, which was refused; that he then demanded that the landlord cause said gorge to be filled up and the lot put in a tenantable condition, which was likewise refused; that finally the tenant filled the gorge himself, and paid the cost thereof, for which amount judgment is asked against the landlord.

A demurrer to both of these defenses was sustained by the common pleas court, and defendants not desiring to plead further, the court took the account and rendered judgment in favor of plaintiffs, to all of which defendants below excepted and filed their petition in error bringing before this court for review the sole question of the sufficiency of the defenses in the answer.

We think the trial court was right in sustaining the demurrer to both defenses.

1. The lease provided that the lessee should pay all taxes and assessments levied or assessed upon the demised premises during the term of the lease, "all payable at 816 Scranton avenue, Cleveland, Ohio," the office of the lessors. It was not provided that the lessee should pay the taxes to the county treasurer.

The petition alleges that the lessors paid all the taxes for 1901 on February 11, 1902.

These taxes were charged on the duplicate and were payable under Section 1091, Revised Statutes, which reads:

"Each person charged with taxes on a tax duplicate, in the hands of a county treasurer, may pay the full amount of such taxes on or before the twentieth day of December, or one-half thereof on or before the twentieth day of December,

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and the remaining half thereof on or before the twentieth day of June next ensuing;" etc.

The lessor therefore had the option of paying all the taxes for 1901 at the December collection; he did not elect to wait until the following June for the payment of the last half; having so elected to pay all the taxes for the year at one time and having so paid them, under the terms of the lease the entire amount of said taxes for the full year was due him from the lessee.

2. Plaintiffs in error claim that the demised premises having been practically destroyed by the gorge, they are either relieved from the payment of rent, or entitled to maintain their counter-claim under the rule laid down in 7 Am. & Eng. Enc. of Law, 147:

"Executory agreements ordinarily are made on the implied condition that the performance of the agreement should not be rendered impossible by the intervention of some accidental and uncontrollable superior agency."

This rule does not apply to the case of an executed lease of lands or tenements in the absence of express covenants to that effect.

In the first place the tenant did not surrender the demised premises; again the contract was not executory, but wholly executed so far as the lessor is concerned, and the damage to the premises occurred during the term; finally, there was no intervention of an accidental or uncontrollable superior agency, not were the premises destroyed—they were only impaired as to access.

It is well settled that in the absence of express covenants or conditions in the lease, where there is no fraud or concealment, there is no implied warranty on the part of the lessor that the leased premises are fit or suitable for the purpose for which they are rented, and no implied covenant to put or keep them in repair. *Linn v. Ross & Co.*, 10 Ohio, 412; *Shindelbeck v. Moon*, 32 O. S., 264; *Hilliard v. Gas Coal Co.*, 41 O. S., 662; *Shinkle v. Birney*, 68 O. S., 328.

The case of *Linn v. Ross & Co.* involved the destruction of

a leased building by fire, and subsequently the Legislature passed the following act (Section 4113, Revised Statutes) :

“The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased.”

But it was held in the case of *Gay v. Davey*, 47 O. S., 396, that a surrender of the lease is necessary to obtain the benefit of this section, and in *Avery v. House*, 2 C. C., 246, that it applies only to the building and so much of the premises as are necessary to its enjoyment. It is not claimed that the statute applies in this case, but it is cited to indicate the only exception to the general rule above set forth.

From the general rule it follows that, in the absence of any agreement on the part of the landlord to repair, a tenant can not recover from the landlord the cost of repairs made by him. 18 Am. & Eng. Enc. of Law, 216.

In the case of *Mumford v. Brown*, 6 Cowen, 475, Savage, C. J., says:

“It was not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do this. The tenant takes the premises for better and for worse, and can not involve his landlord in expense for repairs, without his consent.”

In the case of *Ward v. Fagin*, 101 Mo., 669, it was held that any injury to the leased premises, and through them to the tenant, caused by the negligent act of third persons, can not create or cast on the landlord a liability which, prior to such act, did not exist.

The case of *Polack v. Pioche*, 35 Cal., 416, is interesting, the facts in the case being similar to the facts in this case.

Judgment affirmed.

W. C. Ong, O. J. Campbell, for plaintiffs in error.

Beavis & Johnson, for defendants in error.

VIOLATION OF SUNDAY CLOSING LAW.

[Circuit Court of Cuyahoga County.]

LOUIS KUBACH V. THE STATE OF OHIO, AND FRED. GITTINGS V.
THE STATE OF OHIO.

Decided, January 8, 1904.

Jurisdiction of Mayor of Village—Section 1824, Revised Statutes, Constitutional—Second Offense Must Be Charged as Such—Aggregate Penalties May Exceed Limit of One—Information Not Required.

1. Under Section 1824, Revised Statutes, mayors of villages have final jurisdiction in misdemeanor cases in which, under the Constitution, there is no right to trial by jury, and such jurisdiction extends throughout the county.
2. Said Section 1824, Revised Statutes, is not in conflict with Section 10, Article IV of the Constitution.
3. In order that a person charged in one affidavit with selling liquor contrary to the statute on more than one occasion, may be entitled to a jury or punished as for a second offense, the affidavit must show a former conviction and that a particular sale is charged as a second or repeated offense.
4. Several charges of distinct sales of liquor contrary to the statute may be made in one affidavit and a fine assessed for each offense, even though the aggregate of such fines exceeds the limit of punishment for one offense.
5. Misdemeanor cases may be instituted and tried before justices of the peace and mayors, upon the filing of an affidavit, and it is not necessary that an information be lodged with the magistrate.

WINCH, J.; HALE, J., and MARVIN, J., concur.

There are eight cases before this court bearing the above numbers, on error to the court of common pleas.

In the Kubach cases, numbered 3134, 3135 and 3136, and in the Gittings cases, numbered 3139, 3140 and 3141, the plaintiffs in error were convicted before Reuben Osborn, Mayor of the Village of Bay, in this county, of violations of the Sunday Closing Law, being Section 4364-20 of the Revised Statutes.

In the Gittings cases, numbered 3137 and 3138, plaintiff in error was convicted before said mayor of suffering gaming, contrary to the provisions of Section 6933 of the Revised Statutes.

The defendants thereupon prosecuted error to the court of

common pleas, where the convictions were affirmed, and error is prosecuted in this court to reverse the judgment of the common pleas affirming the judgments of the mayor.

In the cases for the violations of Section 4364-20, each of the affidavits contained several counts alleging distinct sales of intoxicating liquor, and also charging that the defendant, on the day in question, kept his place open, contrary to the provisions of the statute.

In case No. 3135 there are four counts, three alleging separate sales of intoxicating liquors to the persons named, on the 26th day of July, 1902, and the fourth count alleging that the place was kept open on that day.

In case No. 3134 there are three counts, two alleging sales to different persons on July 19th, and the third count alleging the keeping open on that date.

In case No. 3136 the affidavit contained three counts charging two sales on August 2d, and the keeping open of the place on that date.

In case No. 3139 one sale is alleged, and the keeping open of the place on August 2d.

In case No. 3140 there are three counts, alleging two sales and the keeping open of the place on July 19th.

In case No. 3141, there are three counts, alleging two sales and the keeping open of the place on July 26th.

In the Kubach case he was found guilty of all the sales alleged, but not guilty on each count of keeping open, and in the Gittings cases, he was found guilty of every count charged against him. In each the mayor imposed a fine on each count on which the defendants were found guilty, so that in case No. 3135, above referred to, the defendant was fined \$150, being \$50 each on the first, second and third counts of the affidavit.

In the Gittings case, No. 3137, he was found guilty of suffering gaming by means of a gaming device, to-wit, a slot machine, on July 18th, contrary to the statute referred to, and in case No. 3138 he was found guilty of a like offense committed on July 19th. In each of these cases he was fined \$50 and costs.

On behalf of the plaintiffs in error there are several objections made to the proceedings below. The jurisdiction of the mayor is challenged for two reasons: First, it is said that the mayor of the village of Bay has no jurisdiction to try any cases for the violation of the state law for offenses committed outside of the village of Bay; and, second, that on the face of the record which is before this court, the defendants are charged with second and subsequent offenses, and are, therefore, entitled to a trial by jury, which was denied them. The questions were raised before the mayor in various ways, so that they are properly before this court.

On the first branch of this question, we find that by Section 1824 of the Revised Statutes, the mayor of the village has final jurisdiction in misdemeanor cases in which, under the Constitution, there is no right to a trial by jury, and that this jurisdiction extends throughout the county. Such was the holding of this court in an unreported case which was before it at the last term of court. The case was that of *The State of Ohio, ex rel Carey, v. Metzger, as Mayor of the Village of Bedford*. The relator in that case sought a writ of prohibition to prohibit Metzger, as mayor of the village of Bedford, from proceeding to try the relator for a violation of the Beal Local Option Law, alleged to have been committed in the village of Lakewood in this county. In that case this court held that Section 1824 confers jurisdiction upon a village mayor to try misdemeanor cases in which the defendant is not entitled to a jury trial, arising anywhere in the county. The writ asked for in that case was denied, and the petition dismissed. This court also made the same holding in the unreported case of *Joseph Roth v. P. D. Metzger et al*, where Roth brought suit against Metzger for damages for false imprisonment, in that Metzger, as mayor of Bedford, tried Roth at Bedford for violating Section 4364-20 at Warrensville. It was claimed the mayor had no jurisdiction outside his village. This court held the jurisdiction under Section 1824 extends throughout the county, and affirmed the ruling of the court of common pleas in sustaining a demurrer to the petition. We follow those holdings in this case, and hold

that the statute confers jurisdiction on the mayor throughout the county.

It was further urged in argument that the grant of jurisdiction to a village mayor throughout the county is repugnant to the Constitution, and that jurisdiction could be lawfully conferred upon the mayor only for the village in which he had been elected. In the argument in this case, no particular part of the Constitution was referred to, which it is claimed this statute violates, but in the case of *State, ex rel Carey, v. Metzger*, referred to above, it was claimed that Section 1824 was in conflict with the provisions of Section 10 of Article IV of the Constitution. In that case, this court held, that no such conflict existed, and that that section of the Constitution in no way prevents the grant of such power. We are still of that opinion, and no suggestion having been made that Section 1824 violates any other provision of the Constitution, we hold that Section 1824 is a constitutional and valid enactment.

It is urged, as an additional reason why the mayor is without jurisdiction in these cases, that on the face of the record the defendant is being prosecuted for a second or subsequent offense by reason of the fact that the affidavit, as in case No. 3135, contains four separate charges of distinct offenses. We are cited to a recent decision of our Supreme Court which seems to us conclusive on this point. We refer to the case of *The State of Ohio, ex rel Smith, v. Smith*, decided by the Supreme Court on October 17th, 1903, and reported in the 69 O. S. The opinion in the case will be found in THE OHIO LAW REPORTER of December 28th, 1903, at page 722. In that case the second paragraph of the syllabus reads as follows:

"Unless such affidavit charges the particular sale to be the second or subsequent offense, imprisonment can not be imposed as a part of the punishment, and a justice of the peace with whom the affidavit is filed has jurisdiction to try the accused without the intervention of a jury."

The case under consideration in *State, ex rel Smith, v. Smith* was for a violation of the pure food law, and like the statute under consideration here, authorized the imposition of imprisonment as a penalty for a second or subsequent violation of

the statute, but did not authorize the imposition of imprisonment for a first offense.

On the authority of that case and the following cases, *Larney v. Cleveland*, 34 O. S., 599, and *Inwood v. State*, 42 O. S., 186, we hold that as none of the affidavits in these cases contained any allegation that the offense in question was a second or repeated offense, the defendants were properly prosecuted on all the counts as for a first offense.

We also hold that the affidavit must allege not only a previous offense, but also a former conviction of that offense, in order to justify the increased punishment. To prove a second offense the State must prove a first offense and the proof of one must be as clear and certain as the proof of the other. Any proof of such first offense that falls short of the proof necessary for a conviction therefor would be inadequate. Such being the case, if the accused is charged with and being tried for a second offense only, a first offense should be proved by a conviction therefor; otherwise the accused would be put upon his defense of two charges when being tried upon but one. In none of the cases before us was there any allegation of any previous conviction, nor was there any allegation that the defendants were being prosecuted otherwise than for the first offense, and we therefore hold that the court had no authority on any count of any one of the affidavits under consideration to punish the defendants otherwise than as for a first offense. Imprisonment, therefore, could not be a part of the punishment in any of these cases, and the mayor properly tried the defendants without the intervention of a jury.

Objection is also made to what may be termed the cumulative penalty in these cases, and attention is called to the case in which the mayor imposed a fine of \$150, being a fine of \$50 each on three separate counts for a violation of the Sunday law. The highest penalty that can be inflicted for a single offense under this statute, when the defendant is prosecuted for a first offense, is \$100, and it is claimed that there is error in this action of the mayor.

Bishop's New Criminal Procedure, Section 452, contains the following:

“By the practice everywhere, distinct misdemeanors may be joined in separate counts of one indictment, to be followed by one trial for all, and by one conviction for each, the same as though all were charged in separate indictments, subject to practical limitations from judicial discretion. So, in liquor selling, when made by statute a misdemeanor with a fine for each sale, several counts for distinct sales may be combined in one indictment and the accumulated penalty imposed.”

This clearly justifies the joinder of several counts for distinct offenses in one affidavit in misdemeanor cases where imprisonment is not part of the punishment, to be followed by one trial on all of the charges and a fine upon each, with one sentence for the whole amount of the fine assessed upon the several counts in one affidavit, even though the accumulated penalty exceeds the maximum amount authorized to be assessed upon a single violation of the statute. Such is the general holding of the authorities upon this proposition, and the courts of this state are in accord with such holding. We refer to the following cases: *Bailey v. State*, 4 O. S., 441; *Boose v. State*, 10 O. S., 576; *Eldredge v. State*, 37 O. S., 191.

It is urged on behalf of the plaintiff in error that in misdemeanor cases, prosecuted on behalf of the State where an indictment is not required, it is necessary that the filing of the affidavit be followed by the filing of an information setting forth the offense in the manner usual in informations in criminal cases.

We are not cited to any statute of this state which requires that an information be filed in the mayor's court, nor are we cited to any holding in this state that such information is necessary. It is true the courts of this state have held that in cases where an information is proper, the information must be supported by an affidavit, and will quash the information unless an affidavit has been filed. *State v. State*, 3 O. S., 293; *Eichenlaub v. State*, 36 O. S., 140.

But no court has ever held, to our knowledge, that an information is essential to support an affidavit in cases of this character. The long established practice before justices of the peace and mayors in misdemeanor cases in this state has been to proceed upon affidavit and not upon information.

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Sections 7131 and 7133 authorize certain magistrates, including mayors of villages, to issue warrants for the arrest of any person charged with an offense, upon the filing of an affidavit with such magistrate. There is no requirement in this body of the law, nor elsewhere that we have been able to discover, that with such affidavit an information shall be filed. After the arrest of the defendant, the provisions found in the Municipal Code confer jurisdiction upon the mayor to try the defendant. In this case that jurisdiction is found in Section 1824.

The foregoing disposes of all objections urged by the plaintiffs in error against the validity of the judgments below, and, finding no errors, the judgments of the court of common pleas affirming the judgments of the mayor of the village of Bay in the eight cases before us, are affirmed.

Hart, Canfield & Croke and *James M. Williams*, for plaintiffs in error.

Albert V. Taylor, for defendant in error.

ORDINANCES ESTABLISHING STREET RAILWAYS.

[Circuit Court of Cuyahoga County.]

WM. M. RAYNOLDS, A TAX-PAYER, ON BEHALF OF CLEVELAND, V.
CLEVELAND ET AL.

Decided, June 21, 1902.

Street Railways—Ordinances Establishing—Municipal Authority Limited—Ordinance Must Cover the Same Route Designated in the Advertisement for Bids—Provision for Arbitration Between Company and Its Employees Invalid—Motive of Tax-payer Bringing Suit to Enjoin Immaterial.

1. Authority upon the part of a municipality to regulate and control the construction and operation of street railways is obtained only from statutes expressly conferring such power, and is subject to all the limitations therein embodied.
2. Section 2501 definitely prescribes what shall be done in an establishing ordinance and Section 2502 the conditions under which a grant may be made, and where there has been an advertisement for bids to construct a designated route at the lowest rate of fare, the

municipality can not thereafter grant the right to construct a street railway upon a part only of such designated route, nor can the municipality, without publishing notice of and receiving further bids, make a grant for a route which includes a street not embraced in the route as originally designated.

3. There is no requirement in the statute, providing for the bringing of a suit by a tax-payer to enjoin certain corporate acts, that he shall be free from a personal motive; and a complaint in such a suit as the one at bar, that the plaintiff is not sincere in his action for the protection of the public, but is in fact acting for the benefit of other street car lines, will be disregarded.
4. A provision in an establishing ordinance, that differences between the company receiving the grant and its employes shall be settled by arbitration, is invalid, in that it is a restraint upon bidding and likely to increase the rate of fare.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Appeal by plaintiff.

Wm. M. Raynolds, as a tax-payer on behalf of the city of Cleveland, after making application to the corporation counsel to bring this action which he refused to do, brings this action on behalf of himself, and says that he is a resident and a tax-payer of the said city; that the defendant, the city of Cleveland, is a municipal corporation under the laws of Ohio, and is a city of the second grade, first class; that Tom L. Johnson is the duly qualified and acting mayor of said city; that said Johnson, together with the defendants, Harris R. Cooley, Charles P. Salen, Charles W. Lapp, James P. Madigan, John Dunn and W. M. Beacom are the duly and legally constituted board of control of said city; and that The People's Street Railway Company is a corporation organized and existing under the laws of the state of Ohio. And then he sets up his request served upon the city solicitor to bring this action, and the refusal of the city solicitor to do so and his failure to comply with the request. He states that on January 6, 1902, a certain ordinance, known as ordinance No. 35,897-a, and referred to hereinafter as the "establishing ordinance," was passed by the council of the city of Cleveland to establish street railway routes, to provide for granting of a franchise to construct and operate a street railroad thereon, and specifying the manner whereby such franchise should be granted to

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the party offering to charge the lowest rates of fare under competitive bidding therefor, and prescribing the terms and conditions under which said street railroad should be constructed and operated; that said ordinance was approved by the mayor of said city on January 7, 1902, and was thereafter published as required by law, and took effect and became in force on January 18, 1902. And then he sets out the "establishing ordinance" in full, and the caption to the same is:

"An ordinance to establish street railroad routes, to provide for granting a franchise to construct and operate a street railroad thereover, and specifying the manner whereby said franchise shall be granted to the party offering to charge the lowest rates of fare under competitive bidding therefor; and to prescribe the terms and conditions under which said street railroad shall be constructed and operated."

Then the ordinance provides to establish seventeen different routes, all within the city of Cleveland.

Section 2 provides for advertising for three consecutive weeks for sealed proposals, to be received at the office of the board of control, on the fourth Monday after this ordinance takes effect, to construct and operate a street railroad over the routes as established in Section 1 hereof; and each and all bids for such street railroad franchise so proposed to be granted shall be under and subject to the terms and conditions specified in the following sections of this ordinance.

Section 3 provides for the form and words of the bid, and the form is for the bid on a street railroad on routes as the same are described in Section 1 of the ordinance, as well as other matters, and the rates of fare proposed to be charged, and requires that, accompanying the bid, there shall be \$50,000 put up in money, to be forfeited, under the conditions of said ordinance, if the same are not complied with.

Section 4 requires that each bid shall be accompanied by \$50,000 in United States notes, national bank notes, or gold or silver certificates, to insure the performance of the contract. And the same section provides that the money accompanying the bid declared to be the lowest and accepted by the city shall be retained and become the property of the city as liquidated

damages against said lowest bidder, upon the following conditions: "Said money shall be so retained as liquidated damages upon the failure of said lowest bidder, within ten days after being declared such lowest bidder, to request in writing from the council and the board of control of the city of Cleveland permission to construct and operate a street railroad over the routes defined in this ordinance." And that, "Said money shall be retained as liquidated damages as aforesaid upon the failure of said lowest bidder, within ten days after the passage and legal publication of the ordinance granting permission to construct said six miles of double track, to accept in writing the terms and conditions of said grant." And, "Said money shall be retained as liquidated damages as aforesaid upon the failure of said lowest bidder within six months after the passage and legal publication of the ordinance making said first grant as above specified, to have constructed at least six miles of double track of said street railroad. On completion within the time specified, of said six miles of double track, said money shall be returned to said lowest bidder."

Section 5 provides: "The board of control shall report all bids to the council with a recommendation as to which is the lowest bidder, and the moneys of all other bidders shall be returned to their respective owners immediately after such recommendation."

Section 6 provides: "The party whose bid is accepted by the city, within ten days after the date of being declared the lowest bidder, shall request in writing from the council and the board of control of the city of Cleveland permission to construct and operate a street railroad over the routes defined in this ordinance, and within thirty days after being so declared the lowest bidder said party shall apply in writing for a grant to construct at least six miles of double track and shall furnish the necessary consents of the abutting property owners to so construct said six miles of double track within said thirty days. Said party shall accept in writing the terms and conditions of the ordinance making said grant, within ten days after the passage and legal publication thereof, and the said six miles of double track shall be constructed within six months after the

date of the grant thereof. The said lowest bidder shall make application within six months after the date of said first grant for permission to construct at least an additional six miles of double track of said street railroad, and shall obtain the necessary consents of the property owners and accept the terms of the ordinance making said grant the same as specified for said first grant. Said lowest bidder shall continue to make such applications to construct at least six miles of double track, at intervals of six months, obtain consents and accept the grants as above specified until permission to construct said entire system has been granted. The board of control shall have the power to extend the time for making said applications and obtaining the necessary consent of abutting property owners, and all parts of track shall be constructed, equipped and operated within one year from the time of the granting of each section, unless prevented by legal proceedings over which said lowest bidder has no control."

Section 7 grants certain privileges as to property owned by the city.

Section 8 gives the right to the party whose bid is declared to be the lowest, to erect the necessary lines of poles and wires to connect the necessary power houses with said railroad system, and wherever the said route or routes provide for a private right of way the party so constructing said railroad shall have the right to construct the necessary curve into said private right of way, and to lay said tracks through and across the intervening streets.

Section 9 provides for the kind of power and machinery for moving the cars upon the route.

Section 10 provides: "The rates of fare for which the bidder proposes to carry passengers shall entitle the passenger to one continuous ride in the same general direction, and each passenger shall be entitled to one transfer ticket for passage to another line, at all points of intersection with other routes, if such transfer be necessary to enable him to continue to his destination." And provides further for certain reservations, of the right of the city to regulate transfers to carry out this provision, and also reserves the right to establish transfer

points, and require the exchange of free transfers at such points between the lines of the proposed grantee hereof and other street railroad companies.

Section 12 provides: "Whenever the routes are along streets not in 'free territory,' so-called, now occupied by other street railroad tracks, said party so constructing said street railroad shall have the right to construct straddle tracks, the same to be removed whenever the joint right of use is established."

Section 13 provides that, "Whenever any controversy arises between the party operating the railroad under the franchise hereby proposed to be granted and its employes which interferes or threatens to interfere with the operation of the road, each side of the controversy shall appoint two persons as its representatives, whose action shall be final." And if such board does not agree within three days, then the mayor shall become the fifth member of the board and a majority vote of said board, consisting of five members, shall be final. No motor-man or conductor shall work more than ten hours within the limits of fourteen hours in any twenty-four hours, except in case of emergency causing obstruction of traffic.

Section 14 provides for the expiration of the franchise within twenty years from the date of the passage of the ordinance.

Section 15 is: "The city reserves the right to purchase said street railroad, with any additions or extensions, whenever it may have the power to do so, for such price and upon such terms and conditions as may be agreed upon between it and the owner thereof, or upon their failure to so agree, then for such price and upon such terms as may be fixed by a board of arbitration consisting of three persons, a majority of whom shall decide all questions."

Section 16 establishes certain regulations by which said board of arbitration is to be governed and the manner of choosing the same.

Section 17 provides for the manner of estimating the value of the property to be taken over to the city.

Section 18 is a reservation of the right on behalf of the city to decline to take the property at the valuation fixed by arbitration, but, in case it does decline, it shall not demand the

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purchase within a period of two years thereafter; and also provides that, "Whenever, after ten years from the date hereof, the net earnings of said company exceed eight per centum per annum on the actual *bona fide* value of said road, equipment, extension, etc., irrespective of the capitalization thereof, the owner shall pay one-half of said net earnings in excess of eight per cent., whether said earnings are applied to interest payments, dividends, surplus, extensions or betterments, into the city treasury. And for the purpose of ascertaining said value the same procedure shall obtain as provided in Section 17 hereof for purchase."

Section 19 reserves to the city the right to grant a way for other roads over the tracks of this company.

Section 22 provides: "No bids will be considered which provide for a higher rate of fare than three cents. The city reserves the right to reject any or all bids."

The petition further states that, after the publication of such establishing ordinance, the clerk of the city advertised, according to the provisions of the ordinance, for sealed proposals to be received at the office of the clerk of the board of control until twelve o'clock at noon on February 10, 1902, for the right to construct and operate a street railroad over the routes as numbered and described in the establishing ordinance; that John B. Hoefgen bid at a proper time and place, by a sealed proposal in the form provided for in the above-mentioned establishing ordinance; and that, according to his bid, he agreed to construct and operate a railroad on the routes such as are described in Section 1 of the establishing ordinance, and agreed to conform in every particular to the requirements, conditions, provisions, and stipulations as in said ordinance set forth, and as referred to, implied, or indicated by said ordinance, and the rates of fare therein specified; that he was the only bidder, no other proposal being made; and that thereafter the board of control recommended to the council of said city that the said John B. Hoefgen was the lowest bidder and that he was found and declared by the council to so be; and that thereafter, on February 5, 1902, John B. Hoefgen filed an application to the city council and said board of control of said city for permis-

sion to construct and operate a street railroad over the routes referred to in said establishing ordinance; and that on March 24, 1902, an ordinance known as No. 36,624, and which I shall hereinafter refer to as the "granting ordinance," was passed by the council of the city of Cleveland, purporting and attempting, in compliance with the provisions of the establishing ordinance, the advertising for sealed proposals or proposed bids thereunder, and the bid of the said John B. Hoefgen in response to said advertisement, and the acceptance of said bid, to grant to him, the said John B. Hoefgen, the right to construct and operate a street railroad over the routes in said granting ordinance passed March 24, described; and that said granting ordinance was, on March 24, 1902, approved by the mayor, and was by the clerk of the city published for the first time in *The Cleveland Plain Dealer* on March 28, 1902.

It is claimed that the granting ordinance does not conform to the establishing ordinance nor does it conform to the publication made after the passage of the establishing ordinance, and that there are various other conditions which it is unnecessary to notice at this time.

The petition sets up various respects in which the contract made with J. B. Hoefgen on the part of the city is illegal, and, on account of which illegality, it is asked by the plaintiff to have the court enjoin the construction or the carrying out of said contract. Some of these I will briefly state:

First. That at the time the establishing ordinance was passed and the proposals advertised for, there was no application by Hoefgen for permission to build a road.

Second. That Hoefgen made no application to construct a road on Champlain street before the granting ordinance was passed, and no such application was made by any one, nor was such application published for three weeks.

Third. That there were no proposals, and no bid to construct a railroad over the streets included in the granting ordinance: Superior street from the easterly limits of the city to Rosedale avenue, a distance of about 1,800 feet; Rosedale avenue between Superior street and Wade Park avenue, a distance of about 2,550 feet; Norwood avenue between Wade Park ave-

nue and Bona street, a distance of about 1,425 feet; Bona street between Norwood avenue and Dana street, a distance of about 375 feet; private right of way between Dana street and Lyon street, and crossing the last-named two streets, about 375 feet; East Stanard street between Lyon street and Wilson avenue, about 750 feet; Marquette street between Wilson avenue and Hamilton street, about 900 feet; Hamilton street between Marquette street and Kirtland street, about 1,800 feet; Champlain street between Canal street and Ontario street, about 1,800 feet. These are the distances given in the petition, which are only substantially correct as to some of them, as was shown by the evidence and admitted facts. And it is claimed that as to these parts which are covered by the granting ordinance, there was no proposal and no bidding by Hoefgen.

Fourth. It is claimed that there is a departure in the granting ordinance from the establishing ordinance, as to some 2,025 feet on Rhodes avenue between Denison avenue and Burton street; that this difference consists of whether the tracks of the road shall be used, or whether straddle tracks shall be built.

Fifth. That the bid of Hoefgen was for seventeen routes as required in the establishing ordinance, about seventy miles in length, while the grant is only for a part of these streets and includes other streets not mentioned in the bid, and the grant is for only about eleven miles.

Sixth. That the establishing ordinance, the advertisement for proposals, and the bid of Hoefgen were for all these routes of about seventy miles in length in the aggregate, as a single road and extending to all parts of the city for a single fare, whereas the grant was for only a part; and it is claimed that there was no competitive bidding for the route that was granted. It is claimed that the carrying out of the contract should be enjoined because the bidder was required to put up \$50,000 as a guarantee to get consents, and because of the terms by which it was to be forfeited.

Seventh. That the contract was illegal in the provision for the city to purchase the entire road; that the city had no authority, and that this was a provision that would deter bidders, and thwart the purpose of getting a bid at the lowest fare.

It is claimed that the contract is illegal because founded upon compulsory arbitration of disputes with employes, and because of the unreasonable and unwarranted conditions in this feature of the contract, which tended to prevent free, competitive bidding.

Eighth. That there is a variation in said contract, from the establishing ordinance, as to the right to use other tracks instead of establishing straddle tracks.

After the bid of John B. Hoefgen was accepted he made application as required by the establishing ordinance to build the road; and thereafter, within the time required by the establishing ordinance, he made application to build some thirteen miles of the road, and for which he presented the required consents, and thereupon the ordinance was passed granting him the permission to build that road. He has not the consents on any other part of the road contemplated in the establishing ordinance, nor does the later ordinance purport to give him any contract rights to build any portion of the seventy-five miles except the thirteen miles above referred to, which thirteen miles is comprehended within three of the routes described in the establishing ordinance. And complaint is made that this contract awarded him is illegal in the matters above referred to, and especially so as to the matter pertaining to Champlain street. It is admitted in the case, on behalf of defendants, that there was no application and no publication as to Champlain street.

When the parties were about to make the contract, or prior thereto, it was discovered that consents could not be had over Canal street, and hence no legal contract could be made by the city for the construction of a road over that street, and thereupon, instead of following Canal street from Champlain street to Michigan street and over Michigan street to Seneca street and Seneca street to Champlain street, the route was changed, and the road was continued over Champlain street to Seneca street and did not pass over Canal and Michigan streets; and especially as to the fact that the building of the road under this grant, for some thirteen miles, was never published separate and apart from other routes, was never applied for sepa-

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rate and apart from other routes, and was never bid upon as a separate route; and the city has let it as a separate and distinct route without bidding, without application and without advertisement, and in this the spirit, intent and purpose of the law has been so far violated that the carrying out of this contract should be enjoined.

The defendants' counsel in this case have urged upon the court the great public benefit that this road will be to the public in this city, and of its being a step in the direction that will result in good, and that the court should be willing to help to carry out a purpose to benefit the public. While these considerations urged with so much earnestness by counsel appeal to the court with all the force that they should have in a connection of this kind, yet we regard it our paramount duty in consideration of this, as we do in all cases, to determine what the rights of the parties are. These rights resting in contract, and this contract as to its legality being measured by the authority of the city to enter into and to make such a contract, the only consideration that is worthy of our attention in this case is, as to whether the city has complied with the laws defining its duties and rights, and, if it has acted lawfully, its action should be approved. If it has acted beyond its power, or in such a manner as to thwart the purpose and intention of the law of the state pertaining to this matter, then the court should be fleet to say so and enjoin such unlawful acts. So that our only purpose, as it is our duty, in determining this case, is to determine whether the city in making the contract it has made, has proceeded according to law and has carried out the purpose and intent of the law in what it has done.

The streets and highways belong to the state and are under the control of the state, and, in former times, the establishment of a street railroad was usually granted by a special act of the Legislature; but the state has seen fit to place the streets of a city under the control of the city authorities, subject to such regulations and restrictions as the state may see fit to impose. Merely granting to the city power over streets at a time when street railroads were not contemplated would not necessarily give to the city power to regulate and control the building of

street railroads within the streets of the corporation; and, hence, after giving the power to the city to regulate and control and improve and lay out and establish streets, the Legislature, after street railroads became in use, saw fit, in Section 3437, Revised Statutes, to define wherein the municipal corporations of the state may allow street railroads to be constructed, and conferred upon the city the power, in Section 3438, Revised Statutes, to grant authority to construct the same, and has seen fit under Sections 2501 and 2502, Revised Statutes, and other sections in connection therewith, to prescribe terms and conditions upon which the city council can allow such roads to be built, and these are limitations upon the power conferred upon the city council by the former sections, and the power being granted under limitations and conditions attached thereto, the power can be exercised only in accordance with the limitations and conditions as found in the statutes. If *these* have been complied with in the granting of this railroad in the streets, the city has performed its entire duty, and its acts should be approved by the courts; if not complied with it has failed to make a legal contract and the carrying out of the same should be enjoined.

Section 2501, Revised Statutes, provides:

“No corporation, individual or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest.”

The purpose of this section is to point out what steps are necessary in establishing a road; and it provides that the first step, before anything shall be done, is, that there must be made an application to the council in writing, and the second step is, that the council by ordinance shall grant permission, and, in that ordinance, it shall prescribe the terms and conditions upon, and the manner in which the road shall be constructed

and operated and the streets and alleys which shall be used and occupied therefor.

And we think it is the intention of the statute that upon leave being applied for, the council must, by ordinance, which is the establishing ordinance, map out the streets and alleys and the route that the road is to pursue, and fix in that the terms and conditions and the manner in which the road shall be constructed and operated; and Section 2502, Revised Statutes, provides that none of these things shall be done; there shall be no ordinance nor resolution to define a street railroad allowed except upon the recommendation of a certain board, if the city has that board, and no grant shall be made except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroads at the lowest rate of fare.

It seems to us, then, that Section 2501, Revised Statutes, definitely fixes what shall be done in or by the establishing ordinance. We do not intend to say that the council *can not* act, by way of making an establishing ordinance, unless some one has applied for leave to build a railroad; but the legislators seem to have taken it for granted that the council *would not* act unless some one desired to build a road; and Section 2502, Revised Statutes, says that no grant shall be made except to the corporation, individual or individuals that will agree to carry passengers upon such proposed road at the lowest rates of fare and shall have previously obtained the written consent of a majority of the property holders upon such street or parts thereof.

The establishing ordinance is a condition precedent, and, that it shall mark out the streets and alleys over which the road shall pass, is imperative, and the publishing thereof required in the same section is imperative, and all *that* must be done before any contract can be made, and before any contract can be made there must be some method adopted of ascertaining the lowest bidder. The only practical way to ascertain the lowest bidder is by calling for bids and sealed proposals and determining it in that manner, and the city did not undertake to determine it in any other way, and that, to our minds,

is the only practical method and the one contemplated by the statute.

In this case the contemplation of the establishing ordinance is but one railroad, although some seventeen different routes are prescribed in the ordinance, yet it is everywhere referred to as *one* road. It was treated by the council in the establishing ordinance as *one* road; it was published as *one* road, and the streets and alleys were defined as being *one* road; it was a unit. There is no suggestion, in the establishing ordinance, of *different roads*, but *only different routes of one road*, and the whole action of the city, up to the time of the granting of the contract, seems to point to but one road, but, after the publication, the city undertakes to change the route of the road and undertakes to dissect this road into parts, and accepts a bid over all these routes as though made on the one that it let.

It is contended on the part of the defendants that no application is necessary prior to the establishing ordinance; and it is contended that the passage of an establishing ordinance is not necessary and is not required by the statute—that it is a mere voluntary proceeding by the council if done at all and is extra-statutory. We can not agree with counsel in these views. There is no doubt some uncertainty in the authorities as to the purpose of the application, and this same purpose seemed to bother the judge in the case of *Aydelott v. Cincinnati*, 11 C. C., 11; but the courts are quite uniform in holding that an application and publication thereof is jurisdictional to the passage of the final grant.

In *Aydelott v. Cincinnati*, *supra*, that court held that if an application for the route as finally granted, was not made and published prior to the passage of the final grant, such final grant would be void. This case has a very direct bearing upon the grant on Champlain street between Canal and Ontario streets as made in this case, and it was held in that case that if the streets were changed *after* the publication it would be necessary that there should be a new application and a new publication before the making of the final grant, and, if they were not made, the grant would be void.

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It seems to be fully within the intent as well as the letter of the statute that some resolution or some proceeding of the council is necessary before bids are taken, in order to advise bidders as to what they are to bid upon, and especially as to a definite route. There would be no basis on which bids could be offered unless some route over definite streets and alleys was established and the conditions and rules and regulations governing the construction and operation of the road were definitely known to those who expect to bid.

The defendants rely upon the case of *Sandfleet v. Toledo*, 10 C. C., 460, as authority that an establishing ordinance or resolution is not necessary. But an examination of that case shows that Sandfleet sued as an abutter, and, suing in that capacity, the only question he could raise was the question as to whether the necessary consents had been obtained or not, and he was not concerned with the sufficiency of the application, and the preliminary steps taken by the company and the city were not pertinent questions so far as his rights were involved in the case, and hence that question was not properly before the court. In that case there had been an application for the railroad, and that had been published; there had been competitive bidding, and the railroad had been constructed except one street where it had been enjoined at the suit of an abutter for want of necessary consents on that street. Later, new consents were obtained and a grant made to extend over the street in which the line had not been built for want of consents. The court seemed to regard the publication of an application for the purpose of soliciting bids, as unnecessary because this was an extension and so regarded by the court, and, for that reason, no application was necessary in the case. The court states that it was not the inauguration of a new enterprise; that the street had been once applied for; that the application had been published, and the successful bidder had been ascertained, and the grant had failed for the want of the necessary consents, and that, as to the public, the railroad over the rest of the route was effective as to it.

We do not see how any question could have been raised in that case that would, in any event, bear upon the case before

the court. The plaintiff was such that the only question which he could raise would be a want of consents, and we think that case falls entirely short of being authority for the proposition that the city can, after the preliminary steps are all taken and the jurisdictional facts found to exist, grant only one part of the line upon which bids have not been taken separate and apart from the other portions.

The defendants claim that *Sandfleet v. Toledo, supra*, is authority for their claim that a street not applied for and not bid upon can be covered by the final grant. In that case Summit street had been advertised, bid upon, and had been granted. Every requirement of the law for the protection of the public rights had been complied with; nothing had been left undone; no member of the public could have made any complaint; and construction was enjoined on that street at the suit of an abutter for want of necessary consents. Afterwards the requisite consents were obtained, and that disposed of the only question that the abutter could make, and the question as to whether, when the consent failed on Summit street, the balance of the grant was valid or invalid was never before the court. The only question as to the validity in that case that was raised, and the only one upon which the court could pass, was as to the validity of the consents and whether the required number had been obtained. There was no occasion for the court to pass upon the validity or invalidity of the balance of the grant; it was not challenged by any one who could have been sustained in court under such a challenge.

In *Smith v. Railway Co.*, 8 N. P., 1, definite routes had been applied for, and application had been published, and all the necessary jurisdictional steps had been taken to a lawful grant as to all questions in which the public was interested, or which the public could raise. The only question there was raised by an abutting owner, and the only question he could raise or did raise, was as to whether the required number of feet had been obtained; and, after the consents were obtained on these routes, the city made a contract for the balance of the road as already let.

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We do not regard these cases cited as any authority upon the question before the court pertaining to Champlain street. In this case there had been no application, no publication as to Champlain street, no proposals were called for, none made; and, with respect to this street, there had been no bidder whatever, and the difference in the facts are so striking that the authorities cited fall far short of establishing the proposition.

We are also referred to *Buckner v. Hart*, 52 Fed. Rep., 835. The plaintiff in that case resided on a street which had not been offered for competitive bidding. He objected to the construction of a railroad on that street, and the court held the grant invalid on that street because it had never been put up to competition; but the court was not called upon to say, and did not say, whether this fact rendered the whole ordinance void or not, but did hold the ordinance void on other grounds. The case is authority in the case before the court only so far as it decides that the railroad could not be constructed on the street on which plaintiff lived, because that street had never been put up to competition. And the court further proceeded to hold that the ordinance was void for other reasons. We can not discover that the court intimates whether the ordinance would be void for that reason or not.

It is said that the change from Canal and Michigan streets to Champlain street is so slight a change that the court should not enjoin the carrying out of the contract on that ground alone. It is admitted that if the application, the establishing ordinance and the publication are imperative requirements of the statute, then the city has not complied therewith as to Champlain street; and the comparatively small distance is such, when taking into consideration the thirteen miles, that the court ought not to overturn the granting ordinance on account of that very issue. As we have said before, this entire system is, in contemplation of the parties, but one contract, but one road, and is not separated until application is made before the passage of the granting ordinance to build the thirteen miles. But this question should not be determined on the ground of the insignificance of the deviation, but upon broader principles. The object and purpose of all that the city is doing, and is required to do by the

statute, is to get finally the lowest bidder, or the one who will carry for the lowest rate.

It was known at the time that these bids were made, or soon after, if not at that time, that consents could be had on Canal street, and, for aught this court may know, that fact may have deterred other bidders from putting before the city a bid. If a party knew that he could not get consents to build the road, providing he should be found the lowest bidder, he would not be likely to bid at all; and, if there had been an intimation at the time the bids were received, that the change could be, or would be made, for aught we know, other and lower bids might have been received. And this matter, although claimed to be insignificant, may have been the very thing that kept others from bidding; and only one having bid, can the city change the route without afterwards notifying, or publishing notice, by which others may be permitted to bid after the change is made? We think there is no authority in law for the city doing that, and we can not, in our judgment, overlook the matter on the ground of its insignificance, for, while it is not extensive as to the length of change when compared with the entire line, yet it is sufficient to entirely thwart the very purpose of the statute, and, that being so, the city would have no right to make the change.

We have already said that Sections 2501 and 2502, Revised Statutes, are limitations upon the mode and manner in which the city shall control the streets, and, being such, they must be substantially, at least, adhered to. The statute clearly contemplates that the city is to act when application is made to it, and, when it does act, the steps it is to take are definitely pointed out—as to publication and defining the route, and letting to the lowest bidder, and requiring consents, before the contract is made.

The object and purpose of the statute in requiring publication is, unquestionably, to advise bidders of the nature and character of the road and its location, and of the requirements of the city as to its rules and regulations in governing the construction and running of the same. It is hard to conceive of any other method by which the city might ascertain the lowest bidder and the public be assured that the lowest bidder had

been obtained; and the city adopted this method as to the entire routes described in Section 1 of the establishing ordinance. Those steps were all regular and properly taken for the purpose of establishing a street-car line on that entire system. But, if it was the purpose of the city to let only a portion of the seventy miles or over, after having proceeded regularly to let the whole, and have no bidding arrangement between the bidder and the city as to the remaining portions, but leave them in that condition that if the line is sought to be established upon them, there is no binding contract on the bidder to build them and no binding obligation on the city to allow the builder to build them. This arrangement seems to divorce entirely the thirteen miles let from the entire road and make of it a distinct and separate road. No bids were ever offered or received upon this thirteen miles; none were ever called for; there were no advertisements for bids on it; hence there never was competitive bidding, never a chance offered by the city for competitive bidding on it. For all that appears this may have been the only desirable route on which any one would bid, were the different routes separated. And to obviate the difficulty in which the facts of the case place the city and Hoefgen, it is necessary for the city to contend that application, advertisement and definite description of route are entirely unnecessary; that the only jurisdictional facts to be ascertained by the city before making the contract is that it has obtained the lowest bidder and that the grants are obtained. And the argument of the city is that a start can be made from the point in the proceedings where Hoefgen made application to build the thirteen miles; and, if from that point, the city obtained for that portion the lowest bid, then the contract is a valid one, and the city seems to conclude that it devolves upon the public, as represented by the plaintiff, to show that the lowest rate of fare has not been obtained. This, we think, is illogical and leads to an erroneous conclusion.

The statute points out the method in which the lowest bidder is to be obtained, and that method is intended for the protection of the public, and when the steps contemplated by the statute have been taken, the public is protected; but if those steps are

omitted, the public, in view of the legislation upon this subject, is not protected.

For all that appears in this case, it may be that much better terms could have been had on this thirteen miles of road than upon the entire road as advertised. It may have been there would have been many bidders for a road of that length that would not bid on a road seventy miles or over in length. Much less capital would be involved, and this, of itself, would increase the number of bidders; and the fact that this thirteen miles was a part of the entire line will not validate the action taken in the contract made by the city, for, as we have said before, the city is under no obligation to let any more of the entire road to Hoefgen, nor is Hoefgen under any legal obligation to build the same.

The thirteen miles has been taken as completely out of the entire line as though it had been separate from the beginning. We are of the opinion that the requirements of the statute were not followed in making the contract in question; and the deviation from the statute is such that the public has a right to require the statute to be followed before a contract shall be left for building the thirteen miles.

It has been said in argument, as to the variation between the establishing ordinance and the granting ordinance, and to the conditions as to paying a part of the income from the road into the city treasury, and provisions for arbitration as to differences between the road and its employes, and as to the right of the city to purchase at a future date, should it receive the power to do the same from the Legislature, and other provisions of like character, are immaterial. It seems to us that some of these provisions of the contract, and some of these variations between the two ordinances, are very material, and such an arrangement does not afford the protection that the public is entitled to have under the statutes. Several of the provisions may be proper in a contract of this character, but, if, as the city claims, the only object and purpose of taking the various steps in obtaining a contract is to ascertain who is the lowest bidder, if that is the *ultimatum*, and the steps to arrive at that are immaterial, then it might, perhaps, be said that the contract is

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not so hampered by these provisions that they might not be included under the provisions of the statute allowing the city to prescribe the rules and regulations and the methods of running the road, but this, clearly, would not seem to include a right on the part of the city to determine the method in which differences between employer and employe should be settled, nor would it include the right of the city to place in its terms of arbitration upon the right of the city to purchase. These things are not contemplated in the statute, and the tendency of them is to keep persons from bidding, and, if they do bid, to increase the rate of fare, and we believe them to be contrary to the spirit of the law.

As to the variation between the establishing ordinance and the granting ordinance as to the route to be followed—referring now to those instances where there is a difference other than that of Champlain street—the only grounds on which it is sought to justify the same is that the variation is an immaterial one, being slight, and the variation being as long as the route first prescribed; and, second, on the grounds that no ordinance defining the route was necessary, that it might have been done by any method and at any time changed before the granting ordinance.

The claim as to the variation being a substantial route, as published in the establishing ordinance, is perhaps correct under the evidence in the case; but the claim that a definite route is not necessary is, we think, not well taken. But we do not believe that an ordinance should be held invalid, thus changing the route, unless that change would be such in its nature as to make a difference in the bidding, and, we think, under the evidence in this case, the difference in the bidding would have been slight, if any, and on that ground alone we would not enjoin the carrying out of this contract.

It is contended by the defendants that the plaintiff has no right to bring this action; that he is not sincere in bringing it for the protection of the public, but that he is bringing it for the protection and benefit of the other street-car lines in the city. The only requirement of the statute is fully complied with. There is no intimation in the statute that the party bringing

the action must not have some personal motive and that he may not be influenced by other things than the mere protection of the public; and, in a case tried at Elyria which went to the Supreme Court, and was dealt with there in a manner that the court could not have overlooked this same question, it was ignored by the Supreme Court, though it was made in the case, and the Supreme Court could not have reached the conclusion it did if this ground is well taken in this case. It was not well taken in *that* case, and the party aggrieved was the one who brought the action in behalf of the public. We do not think this ground is well taken.

The judgment is, that the restraining order in this case be made perpetual.

Wilcox, Collister, Hogan & Parmely, Squire, Sanders & Dempsey and *N. C. Boyle*, for plaintiff.

Beacom, Baker, Payer, Gage & Carey and *Blandin, Rice & Ginn*, for defendants.

INJURY FROM A DEFECTIVE CAR COUPLING.

[Circuit Court of Harrison County.]

P., C., C. & ST. L. RY. CO. v. FRED. A. STONE.*

Decided, November Term, 1900.

Railways—Negligence—Personal Injuries—Defective Car Coupling—Brakeman Having no Knowledge of Its Condition is Injured—Presumption of Negligence—Cases Involving Doubtful Circumstances or Conflict in the Testimony Should be Submitted to the Jury Under Proper Instructions.

1. Presumption of knowledge of a defect in a car coupling, both before and at the time of an injury to an employe having occasion to couple the car to a train, is chargeable to the railroad company; and this presumption can not be overcome by proof of facts which tend to raise the presumption that the company did not have such knowledge.
2. A presumption of contributory negligence does not arise as to a brakeman injured while attempting to make a coupling with such a

*Affirmed by the Supreme Court, without report, December 9, 1902.

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car in the night time, with no knowledge of the defect, or of the presence of other cars on the same track immediately in the rear, which the defective car in case of failure to couple would strike, causing a rebound, and in consequence of such rebound the injury occurs.

3. If the testimony as to an accident is conflicting, and the circumstances such that different minds may arrive at different conclusions as to where the fault lay, the case should be submitted to the jury under proper instructions.

VOORHEES, J.; FRAZIER, J., (sitting in the place of Laubie, J.), concurs; BURROWS, J., absent.

The plaintiff's action was for personal injury sustained on or about November 20, 1897, while he was employed by the defendant company, plaintiff in error, as brakeman on one of its freight trains, the accident occurring in the yards at Collier's Station, West Virginia.

Two ground of negligence of the company are charged as a cause of action, which are:

First. That the appliances for coupling on the caboose, attached to the train on which plaintiff was employed at the time, were defective.

Second. That loaded cars were left standing on the track upon which the caboose with other cars of the train were switched, at the time of the accident, in such position that the caboose and train on which plaintiff was engaged in attending to his duties as brakeman, would be likely to collide with them and cause the injury, and in negligently and wrongfully forcing said caboose back against said cars as was done.

The defendant company by answer denies its liability for the injury thus sustained: (1). That it was not negligent in its duty to plaintiff in any act, or omission of duty, whereby injury resulted to the plaintiff. In other words, it denies all the material allegations of the petition upon which liability of the company is predicated, as set forth in the petition. (2). That the injuries sustained by plaintiff were caused by his own negligence, and without any fault on the part of the defendant.

The plaintiff by reply denies that his injuries were caused by any fault or negligence on his part.

The cause was tried at the February Term, 1900, of the court of common pleas of this county, to a jury, resulting in a verdict for the plaintiff in the sum of \$5,250.

Motion for a new trial was filed and overruled, and a bill of exceptions containing the evidence was allowed and filed, and by petition in error the cause comes into this court for review.

A number of grounds of error are assigned as reasons for the reversal and setting aside the judgment. All the assignments of error are not specially pressed in argument, but the principal reasons urged by plaintiff in error are:

1. That the verdict is not sustained by the evidence and is contrary to law.
2. That the verdict is not sustained by any evidence.
3. That the court erred in its charge, and in refusing to charge as requested.

To state the contention more concisely, the plaintiff in error contends that the plaintiff below failed to show any negligence on the part of the company which resulted in or caused his injury; that from the evidence, as shown by the record, the negligence of the defendant in error was the direct and proximate cause of his injury. The questions will be considered in this order.

Was the company guilty of negligence?

The only negligence to be considered is, that the appliances for coupling on the caboose were defective. The ground of negligence on the part of the company by placing or permitting loaded cars to be on the track or switch when the accident occurred, was eliminated from the case at the trial, so far as furnishing a ground for recovery for negligence on the part of the company; and the court instructed the jury that they could not consider it for the purpose of predicated a recovery. But the ground of recovery was based upon the defective coupling on the caboose, and the negligence of the conductor in reference thereto, and in not giving notice to plaintiff of the presence of these loaded cars on the track.

This narrows the inquiry and issue as to negligence on the part of the company to the defective car, and to the negligence

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of the conductor in the particulars above mentioned.

The defect in the caboose complained of is that the coupling was too low. The standard height of draw-bars on unloaded cars was 34½ inches. There is evidence in the record that the draw-bar on the caboose when measured in March, 1898, a few months after the accident, was 31½ inches on each end from the top of the rail, and the conductor testified that they had had trouble with it in this regard from the time it came out of the shop in September, 1897. Immediately after the accident other employees of the company, in order to couple this caboose with the car plaintiff had attempted to couple it with when hurt, had to wedge up the draw-bar on the caboose, and without so wedging it up the link in the draw-bar would not work or connect. When Stone attempted to make the coupling he failed for the same reason. The cars having come together without coupling and the engine having been detached, it was necessary for him to get upon the platform of the caboose to give the cars slack, or to separate them, in order that the coupling could be made. If this coupling had not been defective in the particulars mentioned, he could, as claimed by him, have made the connection in the first instance and without danger or harm to him.

In the trial of a personal injury case against a railroad company for injuries caused by defects in its cars, locomotives and machinery, or their attachments, the defects so causing injury are *prima facie* evidence of negligence on the part of such corporation; and by force of the statute of April 2, 1890, Section 3365-21, Revised Statutes, the burden is thrown upon the company to show by proof that it has used due diligence, and is not guilty of negligence. *Railway Co. v. Erick*, 51 Ohio St., 146.

In view of the provisions of this statute and the decision above cited, the fact that the defect in the coupling existed, the company is presumed to have knowledge of it. The presumption of knowledge of the defect, both before and at the time of the injury, is chargeable to the company; and this presumption can not be overcome by proof of facts which only raise a presumption that the company did not have such knowledge.

Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection or its equivalent to overcome the presumption of knowledge of such defects.

It is contended that there was no actionable negligence on the part of the railway company; that the coupling complained of was not the immediate cause of the injury to the plaintiff. The liability of the company really turns upon this question. The evidence certainly tends to show that from the time this caboose came from the shop, and on up until the time of the accident, it had given trouble to the crew operating the train to which it was attached, with knowledge of the conductor; and immediately after the accident the draw-bar on the caboose had to be wedged up before a coupling could be made with the car next to it. The plaintiff claims he did not know or have any knowledge of the defective condition. The conductor, although he knew of the defect, did not tell the plaintiff of it when he was about to make the coupling on the occasion of the accident. Therefore we think the jury was warranted in finding that there was negligence on the part of the company, through its officers, agents and conductor, in using this defective caboose.

It is also claimed that the plaintiff was guilty of contributory negligence; that he should have seen and known of this defect, having anticipated the difficulties resulting therefrom, when he attempted making this coupling on this occasion, and if he did not know it it was negligence on his part.

Briefly referring to the situation and circumstances surrounding the plaintiff at the time he received his injury, it will appear that he was directed by the conductor to make the coupling on track No. 19, on which track there were loaded cars standing without his knowledge. It was in the night season, between ten and eleven o'clock; the yards at Collier were unlighted; the only lights available were the lanterns of the train crews and the headlights of the locomotives. The conductor of the train on which the plaintiff was employed knew

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of these cars standing on track No. 19; he saw them that night and before the accident occurred to the plaintiff; he knew the position of the plaintiff on the caboose and the purpose for which he was there; he knew the engine had been detached from the moving cars that were to be coupled with the caboose; he knew of the trouble and defect of the coupling appliances of the caboose; he knew of the threatened danger by reason of the presence of these loaded cars on the same track, yet, without any warning of the danger or signal to plaintiff that the engine had been cut loose, he orders him to make the coupling that plaintiff attempted to make when injured. When the cars that were cut loose from the engine came in contact with the caboose, by reason of the defect in the draw-bar they failed to connect or couple. The plaintiff then got upon the platform of the caboose to loosen the brake to give slack to the cars, to enable him to make further effort to secure the coupling, and while in the act of placing the pin in its place to make the coupling, the caboose collided with the standing loaded cars and in its rebound the hand of the plaintiff was crushed.

It is shown by testimony in the record that in getting upon the platform to give slack to the cars and caboose that had come together when the coupling failed, he did what was usual and customary under such circumstances, and it was done in the ordinary way. Some of the witnesses testified that this is the usual and ordinary way of coupling cars situated as these were. The jury, of course, found that he was not guilty of any contributory negligence in this respect, and we do not see anything in the testimony that should lead us to disturb the verdict for that reason.

It is contended by the company that the plaintiff was negligent in attempting to couple the cars from the platform. It is not negligence *per se* on the part of a brakeman to uncouple cars while the cars are in motion when it is necessary to have them in motion to get the proper slack to enable the brakemen to do the work. *Toledo, C. & C. Ry. Co. v. Frick*, 8 Circ. Dec., 28.

It is contended the plaintiff was bound to look out for danger when the cars were backing, and by so looking he could have avoided the threatening danger from these standing cars on the same track.

One who engages in a hazardous employment assumes all risks incidental thereto; but is not bound to anticipate such dangers connected therewith, as arise solely from the negligence of others not in law his fellow-servants; and, therefore, his failure to foresee and guard against dangers of the latter class does not raise against him, nor his personal representatives, a presumption of contributory negligence. *Cleveland, C., C. & St. L. Ry. Co. v. Kernochan*, 55 Ohio St., 306.

It is clearly the law of Ohio, as settled by repeated adjudications of the Supreme Court, that "where the question of contributory negligence depends on a variety of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question ought to be submitted to the jury under appropriate instructions. And, "if the testimony be conflicting, the facts uncertain, or the proper inferences to be drawn therefrom doubtful, in such case it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict." *Marietta & C. Ry. Co. v. Pickley*, 24 Ohio St., 654; *Cleveland, C. & C. Ry. Co. v. Crawford*, 24 Ohio St., 631.

The law of the case being as we have indicated and believe it to be, when applied to the facts disclosed in this record, there is no error in the finding of the jury, nor is it contrary to law. And we think there is no error in the charge of the court as given, nor in refusing to charge as requested.

Judgment is affirmed.

Dunbar & Sweeney, for plaintiff in error.

Erskine & Hollingsworth, for defendant in error.

HEALTH OFFICERS AND THEIR COMPENSATION.*

[Circuit Court of Stark County.]

STATE, EX REL MILLER, v. COUNCIL OF MASSILLON.

Decided, February Term, 1902.

Health Officer—Appointment of, Mandatory—Not in the Interest of the Locality only—But a Requirement for the Benefit of the State at Large—Does not Fall Within the Provisions of Section 1717—Prohibiting Increase of Salary of an Officer During his Term—Creation of a Board of Health also Mandatory—Provision for Expenses of Board and Health Officer's Salary—Such Services and Expenses do not Fall within Section 2702—Appointive and Elective Incumbents of Office—Mandamus.

1. It is mandatory upon council to create a board of health, and it is mandatory upon a board of health to appoint a health officer and fix his salary, and the necessary appropriation to meet the expense must be made.
2. A health officer does not come within the purview of Section 1717, prohibiting an increase of salary of an officer during his term.
3. Nor does Section 2702, providing for the issuing of a certificate that the necessary funds are on hand before liability is incurred, apply to the salary of a health officer or to the expenses of a board of health; and mandamus will lie to compel an appropriation for such salary and expenses.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

This cause is a proceeding in mandamus and comes into this court on appeal. There is but little controversy on the facts of the case, and such facts as we have are submitted to the court on an agreed statement, reduced to writing, and for the purpose of the decision it will not be necessary to refer to them in many instances, as we deem the question that is submitted more a question of law than a question of fact.

There are two primary questions submitted for the consideration of the court. The first question is, whether the relator was a legal officer or employe of the board of health of that city, and

*For holding of the Supreme Court that a health officer is not an employe as that word is used in Section 189 of the Municipal Code of 1902, see 69 O. S., p. — (OHIO LAW REPORTER, Vol. 1, page 766).

the board of health having increased his salary while he was then in office, whether that could be legally done and would be such an act as would lay a foundation in his favor for service at the increased rate fixed by the board of health.

The second question is, whether the council of that city would be compelled to issue its order or make an appropriation for the payment of his services, in the absence of the certificate from the proper officer that there were funds on hand for the payment of his services at the time the liability was increased.

Perhaps I stated the propositions in the reverse order in which they were presented, but we think this would be the logical arrangement of the question that is properly before the court.

The first contention then is, could the board of health increase his salary while he was still in the employ of the board? That depends on the nature of his office or employment. There is no difficulty in the proposition of law that an officer can not receive the benefits of an increase in his salary during the term of his office; and that does not necessarily depend upon an elective office, but it also reaches an appointee to an office. But before passing upon that proposition we think that the word "appointment" has significance. A person is elected to an office for a term, there may be a vacancy in the office, then that office may be filled by appointment; but such an appointee would stand in the same relation that the officer who was elected would stand, and can not receive an increase of salary during the unexpired term of that office. But that is not this case.

What is the office of this officer or appointee who was appointed by the board of health? He is called a "health officer." But has he a term of office? That would be the first question.

The statute now applies to cases where there is an increase during the term. The word "term" has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. It is not a term, for the reason there is no limit to it. It may be likened unto a tenancy at will, not a term, because it has no limi-

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tation. Therefore, it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed. We think that this is the true meaning of Section 2115, Revised Statutes.

“The board shall appoint a health officer, who shall furnish his name and address and such other information as may be required by the state board of health; and shall appoint a clerk, and may appoint as many ward or district physicians as it may deem necessary for the care of the sick poor, and persons under quarantine surveillance, and may provide for such quarantined persons necessary attendants, nurses, medicine and support until convalescent. The board shall have exclusive control of their appointees, and define their duties and fix their salaries; and all such appointees shall serve during the pleasure of the board.”

It will be observed that the duties of the appointee or health officer are not prescribed by statute. He is the servant of the board of health that makes the appointment. He is under their absolute control and direction; and in addition to that, they fix his salary. His salary is at the will of the board of health. His term of office is at their will; they may terminate it at their pleasure.

Then the question will arise, if that be so, does such a person hold the office for a term? Is there any limit to it, to which he may claim by virtue of his appointment? We think not.

It being then exclusively within the discretion and power of the board of health to fix his salary, there is no reason why it may not be changed at any time at the pleasure of the board, whenever necessity would seem to require it. And there would be wisdom in such a provision. Such an officer as this, the duties required of him not being fixed and laid down by the law, but are fixed and determined by the board of health, we can see very good reason why his services to-day, or for a week or month, might be much greater than at other times, dependent upon the condition and purposes for which the office is created, namely, to take care of these persons that require help, and for whom it is the duty of the board to provide. Now, that being the nature of the employment, perhaps it is a misnomer here to call him

officer at all. He is more like an employe or servant of the board of health. Then, if the board of health has the exclusive right to fix his duty, determine the length of time he shall serve them, fix his salary, when they act on that matter, it is then in compliance with the statute fixing the liability of somebody to pay. So we hold that in this case as a fact, that the health office here was not such an office as would come within the purview of Section 1717, Revised Statutes; that it is such an office that the salary is not fixed, and is liable to be changed at the will or pleasure, and the necessity as it may be looked upon and seen by the board of health.

While we are on this branch of the case we want to make a further observation that will be pertinent to the next question. It is not discretionary with the board of health whether they will have a health officer or not. It is mandatory. It requires that they shall have one. The board of health shall appoint this health officer, and then provide how he shall be governed under their authority and direction.

Then we might further observe the purpose of this statute. We think this is a mandatory statute to create this office. We think it mandatory and for the interest and benefit not of a local place entirely, that is of a city or village, but it is such a requirement, or police regulation of the state, that would benefit the state and the citizens at large, that there be somebody to take control and be responsible for conditions that may arise as contemplated by this statute. This will also bear on the next question that we will consider.

This law and the establishment of a board of health is a police regulation, and may be so characterized. It is mandatory, and the Legislature has imposed this duty, and the council of each city is required to establish such a board. If so, then the council are to perform certain duties, and certain officers that may be appointed and employed are not to serve the public gratuitously. Their services are to be fixed and regulated by the board thus created. Then the council's duties are pointed out by statute, Section 2140, Revised Statutes, as follows:

“When expenses are incurred by the board of health, under the provisions of this chapter, it shall be the duty of the council, upon application and certificate from the board of health, to pass

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the necessary appropriation ordinances to pay the expenses so incurred and certified; and the council is hereby empowered to levy, subject to the restrictions contained in the ninth division of this title, and set apart the necessary sum to carry into effect the provisions of this chapter."

There are some further duties that are also mandatory. It is not left discretionary with the council when these expenses have been incurred. Such expenses as are contemplated by Section 2115, Revised Statutes, the services and salary of a health officer, these are expenses that are contemplated or may be contemplated under this section of the statute. These expenses have been incurred, and they have been certified, and it is the duty now of the council to make provision for them, and they have refused so to do. The contention, or legal excuse offered why the council will not pay was, that there was no contract made for the employment of this health officer, as required by Section 2702, Revised Statutes, namely, "that no contract or obligation shall be entered into for the disbursement of public funds unless the proper officer certifies the funds on hand for the payment of such contract or such obligation." That is the one and only vital question we have in this case. Then the first inquiry would arise, is the service of this officer such as is contemplated by the law as coming within the provisions of Section 2702, Revised Statutes? If not, then that objection by the council for not making the appropriation will not avail. We think that that question has been decided, yet we know there is some uncertainty about it. We think that the case of *Wilson v. Cincinnati*, 19 Bull., 10, is significant and pertinent to the question we have now under consideration. Peck, J., says:

"This is an action to recover rent claimed to be due from the city for the use of a building known as the Armory building, situated on Court street. Under an act of the Legislature requiring the city of Cincinnati to provide an armory for the militia, the city authorities made a lease of the building for the term of five years, and put the first regiment in possession, and the regiment continued in possession during the term of the lease, and for a large part of the term the city paid the rent."

Toward the latter part of the term the finances of the city got into such a condition that there was no money to pay the rent,

and then certain questions were raised as to the validity of the contract of lease, under what are known as the Worthington and Burns laws, Sections 2699, 2702.

Those questions were reserved on demurrer to the general term, and there it was decided that the allegation that when the lease was made there was no money in the city treasury specially set apart to meet the expenditure to be incurred under it, did not constitute a defense, because the act under which the lease was made (74 O. L., 235, now Section 3085, Revised Statutes), is mandatory, and requires the city to provide an armory for the militia and pay the expenses of the same, while providing no method of raising funds therefor.

We think that the statute we are considering is just as mandatory upon the board of health. That is, not only mandatory upon the city council to create the board of health, but it is equally mandatory upon the board of health to create the office of health officer and to fix his salary, etc. These are things which the Legislature of the state has required shall be done; and if they are done and the expenses have been incurred, then what is the duty of council under Section 2140, Revised Statutes? That they must make appropriation to meet this expense. There is no discretion in it, and it is not a subject of contract, but is a mandatory duty cast upon the board by the state, and they owe that duty to the state.

Without taking more time we are inclined to that view, although we feel the force of the arguments that have been made against this proposition. It is not as clear and free from doubt as we would like to have the question. But we may make this further observation—this court is somewhat committed to this line of decisions whether right or wrong. We had a case in Newark at our last term, when the smallpox was prevalent in that city. A physician had been selected and detailed to take charge of the smallpox patients. One of the questions in that case was the undue action of the board, and the question was raised whether a majority of the board, a quorum, could make such arrangements. We held in that case that they could, and we think the authorities bore us out in that conclusion. That question is perhaps out of this case, but if it were in, we would

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hold in this case, that it was of such a character that a majority of the board would be competent to make arrangements for the appointment of this officer and prescribe his duties and fix his salary. But the principal question in that case was, after he had incurred these expenses, and the services had been faithfully rendered, and there was no dispute as to the amount, when it was certified to the council of the city of Newark, they refused to pay it or make appropriation for it. Suit in mandamus was brought, and the question as to there being no certificate that the fund was in the treasury for the payment of these services was raised. Upon full consideration at that time we came to the conclusion that that was not necessary, it was not such a case as came within the purview of the section of the statute that I have already referred to. So we issued a peremptory writ of mandamus to compel the city council of Newark to make an appropriation to pay the services of this physician. That case is in the Supreme Court. If we were right then we are right now. If wrong then, perhaps we are equally wrong now. It is the duty of the court to be consistent and take chances of reversal, and we will render the same judgment and decree we did there—a peremptory writ will be issued, and costs to follow.

A. A. Thayer and Mr. Young, for plaintiff.

A. Pomerene and Solicitor Howell, for defendant.

ACTS INTENDED TO INDUCE A CONFESSION OF CRIME.

[Hamilton County Circuit Court.]

FREDERICK GEIGER V. THE STATE OF OHIO.

Decided, February 1, 1904.

Confession of Crime—Improper Inducements—Which Did Not Induce the Prisoner to Confess—Testimony of Child Four Years of Age—Competent for the Purpose of Showing that Defendant Acquiesced in Statement Made by Remaining Silent—Action of Police Officers in Attempting to Secure a Confession—Denial of Request for Counsel—Jury Commissioners Act Valid—Irregularities in Selecting Grand Jury—Signature of Foreman to Indictment.

1. An offer of help "if he would like to relieve hi smind," made by a police judge to a prisoner charged with murder and awaiting his preliminary trial, is an inducement to make a confession, but is not prejudicial if the statement subsequently made by the prisoner was not induced by such offer, but was in fact voluntary.
2. A statement made by a child four years of age in the presence of his father and a chief of police, tending to inculcate his father in the murder of his mother, is admissible for the purpose of showing that the prisoner acquiesced in the statement by remaining silent.
3. A refusal to permit a prisoner to confer with counsel, at a time when police officers were endeavoring to secure a confession from him, is not a matter which a reviewing court will consider, unless it distinctly appears in the record that in consequence of ill treatment by the police he was dazed, confused or unconscious, and therefore unable to understand the questions put to him.
4. The act of September 30, 1902 (96 O. L., 3), providing for the appointment of jury commissioners, confers power of an administrative character, and is not judicial within the meaning of Section 1, Article IV of the Constitution; nor is it unconstitutional because it provides that only judicial freeholders shall be appointed commissioners.
5. Mere irregularities in the selection of grand jurors must be taken advantage of, if at all, by challenge for cause, and can not be pleaded in abatement.
6. It is not fatal to an indictment that the foreman signed it J. P. Clark, instead of John P. Clark, the name appearing on the venire, for the court appointing the foreman is presumed to know his identity.

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GIFFEN, J.; JELKE, J., and SWING, J., concur.

Under an indictment charging the plaintiff in error with murder in the first degree, he was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary of the state of Ohio at hard labor during his natural life.

The chief ground of error alleged is the admission in evidence of certain declarations or admissions made by the prisoner after his arrest in the presence of police officers having him in custody; the one being a declaration made in response to questions put to him by William H. Lueders, Judge of the Police Court, the other being an admission or acquiescence by silence in a charge made by his infant son, Stephen Geiger, in the presence of James Casey, Inspector of Police.

In the first instance, Judge Lueders made the following statement:

"I said to him that if I could do anything for him or help him or relieve his mind in any way that I should be glad to do so, and then he said he would see me in the morning, or I said I would see him in the morning.

"Q. (By Counsel). You said to him if you could do anything for him you would be glad to do so?

"A. Yes, sir.

"Q. That you would do all in your power for him to ease his mind?

"A. Yes, sir.

"Q. And anything you could do for him you would?

"A. I did.

"Q. He knew at that time you were a judge?

"A. He certainly did."

The next morning the following occurred:

"I said, 'good morning.' I asked him if he had anything to say. He said, my wife is dead, I have nothing to fear, I have nothing to say."

An offer of help to a prisoner under such circumstances made by a judge of the police court would ordinarily inspire hope in the mind of a prisoner and induce him to make a statement concerning the crime for which he was held; but while it was calculated to induce such statement, it appears that the prisoner in this case was not so induced. In the first place, when the offer of assistance was made, nothing was said by the prisoner

other than that he would see the witness in the morning, and no reference was made to the conversation of the first day when they met on the following morning. It is, therefore, less probable that what he did say on that morning was induced by the tender of assistance made by Judge Lueders.

In the second place, the statement itself shows that the prisoner was not induced to make it by reason of the inducements offered of help, but rather in answer to the question *whether he had anything to say*, and the answer given is equivalent to saying, *I have nothing to say, because my wife being dead, I have nothing to fear.*

The statement made by the witness, Judge Lueders, to the prisoner contains no suggestion of a threat, but rather of hope that the prisoner through him might obtain help. In the case of *William Spears v. The State of Ohio*, 2 O. S., 584, the syllabus contains the follow propositions:

“No confession can be received in evidence in a criminal case, unless it was voluntary.

“A confession induced by hope or fear, excited in the mind of the prisoner by the representations or threats of any one, is not to be considered as voluntary.

“The question in every case, where a confession has followed representations or threats, is, was it produced by them?”

Applying the principles announced in this case to the facts before us, we are constrained to hold that while inducements were not wanting, the statement made by the prisoner was not produced by them, but on the contrary was voluntary.

The other alleged error involving an admission of the prisoner, occurred while James Casey, Inspector of Police, was on the witness stand, and the question was asked by the prosecuting attorney, as follows:

“I will ask you to state what the boy said.

“(Objected to by counsel for defendant.)

“MR. SHAY: I now ask that I be permitted to examine the witness on his *voir dire*.

“(Motion overruled, and counsel for defendant excepted.)

“Mr. Shay: I object to its competency.

“(Objection overruled, and counsel for defendant excepted.)

“Mr. Shay: I expect to prove upon my cross-examination, if permitted so to do, of this witness that the child was of delicate years, only four years of age, and that he had said that the declaration that he made to the police, in which he said that his father hurt his mother on that night, was instilled into him by his uncle on the night after they left the house where his mother was dead; that he was asleep and did not see it, and did not know anything of it or concerning it; that the child is but four years of age, and does not understand the nature of an oath and would be incompetent as a witness in this case; that the defendant was incarcerated in the jail on York street at about 12 o'clock on Thursday night, after the alleged death of his wife; that he was kept up by a constant jabbing and relay of police officers that night and not permitted to sleep, and brought out two or three different times before the police officers and the witness upon the stand, James Casey, who was at that time acting as superintendent of police, against his will, and that he objected to being brought before the said chief of police; that he demanded the right and privilege of seeing counsel, which was refused him; that his counsel, Messrs. Shay & Cogan, called at the office of Mr. James Casey to see the prisoner, and they were refused admission to him, and that this inquisitorial proceeding was had in this manner, against the wish of the defendant and against the wish of his counsel, and his counsel excluded from being present, and that it was no voluntary appearance upon his part, all of which this defendant will be able to show if permitted so to do.”

Clearly the court was in error in overruling the motion of counsel for defendant for permission to examine the witness when he was about to relate the statement made by the boy, Stephen Geiger, in the presence of his father, the prisoner, charging him with assaulting his wife, the deceased, with a pair of scissors, but it does not follow that the error was prejudicial, unless the facts which counsel for the defendant offered to prove when he asked for permission to cross-examine the witness make it so. In the case of *Rufer and Egner v. The State of Ohio*, 25 O. S., page 464, the third proposition of the syllabus is as follows:

“Where, on a criminal trial, a witness is offered by the state to prove a confession made by the defendant, to the admission of which testimony the defendant objects on the ground that the confession was not voluntary, it is the right of the defendant to inquire of the witness and prove his objection before the con-

fession is given in evidence; it is error for the court, in such case, to refuse him leave to make such examination until after the examination in chief has been concluded and the confession given to the jury.

"4th. A judgment in such case, however, will not be reversed for refusing the defendant leave to show, by preliminary proof, that the confession was obtained by improper inducements, unless the facts constituting the alleged inducements, as proposed to be proved, be set out in the record."

The first set of facts offered to be proven by counsel in this case related to the competency of the child as a witness; but the statement of the child was not offered as substantive proof of the crime charged, but only to show that the prisoner, in whose presence it was made, acquiesced by his silence. It has been held in the case of *Richards v. The State*, 82 Wis., 172, in the fourth proposition of the syllabus that—

"Inculpatory statements, made in the presence and hearing of one accused of crime, which he, having opportunity to do so, does not deny, and the truth or falsity of which is within his personal knowledge, are admissions of the accused by acquiescence, and as such admissible in evidence, although such statements were made by a person not competent to testify in the case."

Another set of facts, among those offered to be proven, relate to the truth of the statement made by the boy. But whether true or false, is one of the vital questions involved, and if false called all the more for a response by the prisoner. Other facts relate to his imprisonment or alleged barbarous and inhuman treatment by the police officers having him in charge, but there is no statement that the prisoner, by reason of the loss of sleep or otherwise, was unable to understand or did not hear the statement made by the boy. In support of the objection to the admission of a statement made in the presence of the prisoner under such circumstances, counsel has cited the case of *Bram v. United States*, 168 U. S., page 532. The facts in that case are, however, different from those in this case, in that the prisoner there made a statement in response to the questions of the police officer, and the court held that such statement was not a *voluntary confession*. But in the opinion, page 563, it is said:

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"Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. It must not be considered that by referring to these authorities we approve them."

The argument in that case proceeds upon the theory that the prisoner is protected by a constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, and that while under arrest and questioned by a police officer he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply, he would be benefited thereby. It is difficult to see why the admission of such statements is not an evasion of this constitutional provision intended for the protection of the prisoner. But, however strong the reasoning of the court in that case may be, the question is not an open one in this state, as the Supreme Court has held in the case of *Murphy v. The State*, 36 O. S., 628, as follows:

"Where two persons, charged with larceny, having stolen property in their possession, were taken in custody by a police officer, the declarations of one of them, assuming to speak for and implicating both, made to the officer in the presence and hearing of the other person charged, who remained silent, are competent evidence for the state on a separate trial for the latter"—relying upon *Kelly et al v. People of the State of N. Y.*, 55 N. Y., 565, of which the syllabus is as follows:

"Upon a criminal trial, evidence that the accused, when charged with the offense, or when declarations touching his guilt were made in his presence and hearing, remained silent when it would have been proper for him to have spoken, is competent, and it is no objection to the admission of the evidence that the accused was, at the time, under arrest."

Although the case of *Bram v. The United States*, and other cases in many other states held that such testimony is inadmissible, we are, of course, bound by the decision of our own Supreme Court. We do not wish to be understood, however, as approving the alleged ill treatment of the prisoner by the police.

The zeal of the police officers in the discovery and punishment of criminals as manifested by fair and honorable means, is worthy of the highest praise, but when accompanied by torture and persistent and unfair efforts to entrap the prisoner and manufacture testimony against him, not only impedes and tends to defeat justice, but deserves the condemnation of all good citizens.

Other facts, which defendant through his counsel offered to prove, were his demand for counsel and the request of Messrs. Shay & Cogan to see the prisoner. It does not appear for what purpose he wished counsel at that time, nor that he was in need of advice from any source except as it may be inferred from the alleged ill treatment accorded him by the police. If he were dazed, confused or unconscious by reason of such treatment, and therefore unable to understand the questions put to him, such facts should distinctly appear in the record, and not be left to mere inference.

We are of opinion, therefore, that the court did not err prejudicially in receiving in evidence the statement of the boy, Stephen Geiger, and the fact that the prisoner said nothing in reply.

Many other errors are assigned, but the following only are relied upon: The objection that the act of September 30, 1902 (96 O. L., 3), to provide for the appointment of jury commissioners is unconstitutional and void in that it seeks to confer judicial powers, is without merit. Although the power conferred requires the exercise of judgment, it is administrative in character, and not judicial within the meaning of Section 1, Article IV of the Constitution of the state. Nor is it unconstitutional because it provides that only judicious freehold electors shall be appointed as jury commissioners; It has uniform operation throughout the state, and affects alike all the members of the class designated.

The objection to the manner of selecting and drawing certain grand jurors is also without merit. Mere irregularities must be taken advantage of, if at all, by challenge for cause, and can not be so pleaded in abatement (*Huling v. State*, 17 O. S., 583).

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It is further claimed that the indictment is not signed by the foreman of the grand jury, John P. Clark, but by J. P. Clark, and therefore is not a true bill. This variance is not fatal, for the court appointing the foreman is presumed to know his identity (*Whiting v. State*, 48 O. S., 220).

We find no prejudicial error in the record, and the judgment will be affirmed.

Shay & Cogan, for plaintiff in error.

Hoffheimer, Morris & Sawyer, Prosecuting Attorneys, for defendant in error.

INJURY TO A WORKMAN FROM LIFTING HEAVILY TO SAVE HIMSELF.

[Circuit Court of Lucas County.]

PATRICK SCANLON V. LAKE SHORE & MICHIGAN SOUTHERN RY. CO.

Decided, July 1, 1902.

Negligence—Workmen Engaged in Raising a Heavy Weight—They Lift Unevenly, Causing the Weight to Slip—One Lets Go to Save Himself—And the Man Next to Him is Strained by the Double Weight thus Thrown upon Him.

1. The occurrence of an accident does not raise a presumption of negligence, nor if a given piece of work is undertaken in an ordinarily prudent manner does it establish negligence to point out after the accident has occurred how it might have been avoided.
2. Four men were attempting under the direction of a foreman to load upon a car a railroad frog, weighing 815 pounds. They stood two on each side. The frog was raised a little too high by the men on one side, causing it to slip toward the men on the opposite side, whereupon one of them loosened his hold in order to get out of the way, compelling his companion S to sustain the weight intended for both of them to prevent the frog from slipping further and crushing him. The severe strain injured him. *Held*: That in as much as the task was a simple one, containing no element of danger not as apparent to the employee as to the employer, and is usually performed by four men, and the strain upon S was due to the action of his fellow employees, no liability attaches to the railroad company.

HULL, J.; HAYNES, J., and PARKER, J., concur.

The action below was brought by Scanlon to recover damages for injuries which he claimed he had sustained on account of the

negligence of the railway company. The case was heard by the court and a jury, and, at the conclusion of the plaintiff's testimony, on motion of defendant, the court directed the jury to return a verdict in favor of the defendant, and judgment in favor of defendant was entered upon that verdict. This action of the court is claimed to have been erroneous, and it is sought to reverse the judgment.

The plaintiff was in the employ of the Lake Shore Company and had been for some twenty-one years at the time of his injury, which occurred in the early spring of 1899. He had worked in different capacities, and at the time of the injury was working as a section man and had been so employed for something over two years. He was engaged at the time of his injury in assisting in the lifting of a heavy cast iron frog which they were attempting to load into a car, called a gondola car, and it was alleged and claimed that the railway company was negligent in not furnishing a sufficient force of men and in undertaking to have this piece of iron loaded onto the car in an improper manner and in not furnishing a proper and fit car for the purpose. These are the three grounds of negligence that are complained of against the defendant railway company.

The piece of iron was lying by the side of the track, not far from the Lake Shore depot in the city of Toledo, at a place called the Middle Ground. Four men, including Scanlon, were called by the foreman to load it in the car. There were on the car two other men who were there for the purpose of assisting in loading articles on the car, but who took no part in the loading of this piece of iron onto the car. The men rolled the piece of iron over the rail upon the track immediately at the rear of the car, the end-board of the car being pushed up a foot or a foot and a half so that this frog might be loaded in. After it had been rolled into the middle of the track they ended up the frog, lifted up one end and turned it over so that one end of it rested on the bottom of the car, the other resting in the middle of the track, and under the end which rested on the track was placed a block, so that it was lifted up a little in order that it might be raised better. After the frog was in this position the foreman inserted in some holes which were in the frog (perhaps left there

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for that purpose) some bolts, in order that the frog might be lifted with a pointed crowbar, the bolts being for the purpose of holding the bar and to keep it from slipping off the frog. After this was done the men took the bar and placed it under the bolts, two men taking hold of the bar on each side of the frog, Scanlon and a man by the name of Fanning being on one side and the two other men on the other side, and the foreman standing immediately in the rear. The men then undertook to lift up the end of the frog which was resting on the track and slide the frog into the car, one end of the frog resting on the car. Scanlon was facing the car, and Fanning, who was on the same side of the frog with him, was with his back to the car and facing Scanlon, and the two men on the other side were in a similar position. When the frog was lifted a short distance from the bed of the track (just how far does not appear exactly, but not a great ways) for some reason, probably because the side opposite to Scanlon was being lifted higher than the side he was on, the end of the frog which was resting on the car began to slip towards Scanlon and Fanning, and Fanning thereupon, according to Scanlon's testimony, let go of the bar, which he was holding with Scanlon on that side of the frog, in order that he might get out of the way of the frog, which he feared would fall on him, and came around on the other side of the bar to get another hold. This, as was claimed, threw a large part of the weight of the frog upon Scanlon, at least the weight of half of it, and he complains that the weight was so great and he was compelled to lift so much that he sustained internal injuries, the rupturing and tearing away of the muscles of his abdomen. They let the frog down on the track as soon as they could and Scanlon found himself to have been injured. The top of the frog did not slip off the car, but slipped some inches towards the side of the car on which Scanlon was.

This is a brief statement of the facts as disclosed by the record, and from which it is claimed there was evidence tending to show negligence on the part of the railway company, and that the case should, therefore, have been submitted to the jury.

It is a well settled principle of law that an employe does not assume risks which are due to the culpable negligence of his

employer, but that he does assume those risks which are fairly and reasonably incident to the employment in which he is engaged and which are not due to the negligence of his employer. As stated in a case cited by counsel for plaintiff in error, *Van Duzen Gas & G. E. Co. v. Schelies*, 61 Ohio St., 298:

“A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident.”

It is claimed by the defendant in error that the evidence offered by the plaintiff did not tend in any respect to establish negligence on the part of the railway company; that whatever dangers there were, or risks, in this employment were open and plain to Scanlon, and that he assumed them.

One ground of negligence claimed was the kind of car that was used in this work. It appears from the record that a flat-car or a box-car had ordinarily and usually been used in doing this kind of work (the loading of frogs of different kinds) theretofore. Scanlon testified that he helped to load frogs upon that kind of a car—into a box-car, open at the side, and a flat-car, being so built that the frog might be loaded at the side. But Scanlon was not injured when he was getting this frog onto the track at the rear of the car; he sustained no injury on account of its being necessary to load this frog onto the end of the car instead of the side, and the floor of the car itself does not appear to have been any higher than the floor of a box-car, or of a flat-car, and when the end-board was raised (as it was in this case) we are unable to see how this car was unfit for this use or why it was not as well fitted for the loading of a frog into as a flat-car or a box-car. The end-board was raised sufficiently high to clear the frog, and the difficulty seems to have been that the frog, for some reason, slipped or slid along the edge of the floor of the car, causing Fanning to let go, as has been stated, and resulting in the injury of Scanlon.

We are of the opinion that there was nothing in the evidence to show that there was any negligence on the part of the railway company in using this kind of a car. They were not bound

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under the rules of law to use the very best appliances in the way of a car; they were bound to use ordinary care, and if, at this time, they had a car of this kind which they desired to use for this purpose and if, for some reason, they did not wish to use another kind of a car, or did not have the other kind at hand, we see nothing in that to constitute negligence on the part of the railway company; in fact we are unable to see why this car was not as safe for the loading of this frog as a box-car or a flat-car would have been.

It is claimed further, that the force of men was insufficient to do this work. Four men were engaged in lifting the frog, which weighed about 800 pounds, perhaps exactly, 815 pounds. They seemed to have had no special difficulty in rolling it over the rail onto the track, nor in "ending it up" so that one end rested on the rear of the car and the other on the railroad track, in fact, there was no trouble until this occurrence; until the sliding of the frog and Fanning letting go of the bar as has been stated. Now it does not seem to us that such an occurrence as this was one that it had ever been the practice to have these men stationed that the railway company was bound to anticipate in the exercise of ordinary care. Four men were all, apparently, that could well use the bar that was placed under the frog, two on each side, and if the frog had not slipped there would have been no difficulty in lifting the end of the frog and shoving it into the car, and if one side of the frog had not been lifted higher than the other side it is pretty clear that the frog would not have slipped. And it does not seem to us that such an occurrence as this was a thing that could reasonably have been anticipated by the railway company. The foreman was standing immediately in the rear of the men and the frog, so that he might render assistance when the end of the frog was lifted—that he might assist in shoving it into the car. If Fanning had not let go, the weight of the frog would not have been thrown upon Scanlon as it was. It might not have been negligence in Fanning to let go; probably it was not, he seeing the frog slipping towards him, probably acted in a natural way in letting go of the bar; but, be that as it may, it appears that whatever did happen there was on account of the acts of fellow servants of Scanlon, whether it was negligence or whether it was an act of poor judgment, or what-

ever it may have been, his injury was due to the acts and conduct of the men, of the fellow servants who were assisting him in the doing of this work. It is, of course, well established that an employer is not liable for injuries caused entirely by the negligent acts of a fellow servant.

It is urged that the company ought to have had men on the rear of the car to take hold of the frog and prevent it from slipping, in case anything of this kind occurred. It does not appear there; it does not appear that there had ever been an accident of this kind before. It was an ordinary, simple piece of work, the picking up of this piece of iron, this iron frog, ending it up and shoving it into the car—as simple a piece of work as loading a timber onto a wagon, or a log onto a sled or the loading of any other heavy object into a vehicle; and the company seems to have proceeded, as it seems to us, in a way that a person of ordinary prudence would have proceeded, and we think that there was no evidence offered tending to show negligence on the part of the company in this respect. Four men seem to have been ample to roll the frog onto the track and seem sufficient to end it up and to have been strong enough to put it into the car. The trouble came from the frog slipping and sliding as these men lifted it. That was something that could have been anticipated by Scanlon as well as by the railway company. Injuries are liable to happen to men when they are engaged in work of this kind, but if that is as apparent to the employe as it is to the employer, if the employe has as much knowledge of the danger as the employer has, the employer is not liable if something of this kind occurs without negligence on the part of the employe.

This question is discussed in a Michigan case, *Nephew v. Whitehead*, 123 Mich., 255 (81 N. W. Rep., 1083), a case where the facts were quite similar to the facts here. The syllabus is:

“An employe, experienced in handling heavy objects, can not recover against his employer for injuries received by being struck by an iron beam which he was assisting to unload from a wagon on which he had helped to load it; the operation being a simple one, and the employer having no knowledge of danger that the employe did not himself possess.”

The court say, in the opinion:

“The raising was done by six men standing alongside of the

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beam behind the wagon, who lifted the beam until it was even with the top of the wheel, and then pushed or threw it over. The beam rested, perhaps momentarily, on the wheel. Being thus at an angle with the length of the wagon, the beam, in falling, cleared the wheels. Plaintiff was one of the six men thus employed. They all stood on the side of the beam opposite to the direction in which it was to go. The beam was lifted to the top of the wheel, but as it was pushed over, plaintiff, in some way unexplained by the evidence, was struck by the beam and injured. The beam went beyond the wheel, as it was intended. The plaintiff brought this suit to recover for the injuries thus received. The circuit judge directed a verdict for the defendant. The plaintiff brought the case here by appeal.

"If the plaintiff can recover in this case, an employer of labor would be liable whenever an accident occurred. The operation to be performed was a simple one. With the experience plaintiff must have had in handling heavy objects, he must have known as much about the danger involved in the unloading of these beams as any one." (Citing authorities). "We do not deem it necessary to discuss the case."

Scanlon, although he testifies he had never assisted in lifting a frog as large as this one and did not know the weight of this frog, still was an experienced railroad man and had worked for the railway company for some twenty-one years and had had experience in lifting frogs of the same character, though perhaps not quite so large, but it is clear that he knew that a chunk of iron of the size of this one was heavy and that it would require rather heavy lifting, and it would be apparent to any one that if, in the course of lifting such a piece of iron onto the car, one of the men should let go of the bar, as happened in this case, that it would throw the weight upon the man who still retained his hold upon the bar. This was something liable to occur. The proper carrying on of the work depended, as it always does, upon each man who was engaged in it performing his part. One of the risks that the employe takes is that his fellow servants—fellow employes—who are without any authority over him, will do their duty in the carrying on of the work.

It seems to us that this case comes fairly within the principle of the case decided by the Supreme Court of Michigan to which I have referred. The transaction here, as in that case, was a simple one—the loading of an object onto a car; and, unfor-

tunately, in the doing of it Scanlon was injured, but without, so far as we can see, any negligence on the part of the railway company.

In this case, as in many other cases, it is easy after the injury has been done to point out how it might have been avoided. If there had been men on the car, taking hold of this frog so as to prevent its sliding, perhaps Scanlon might not have been injured. Still he might, for he was injured by reason of Fanning letting go of the bar, but Fanning let go of the bar on account of the frog's slipping, as it was said. Although we may look back at the occurrence and see how it might have been avoided, that does not necessarily show that the railway company was guilty of negligence in not providing the means for avoiding it. If appliances were always provided so that an accident could not happen, of course no one would ever be injured. But accidents do occur in the performance of work of this kind and men are injured without any negligence on the part of any one. The mere fact that a man is injured does not show that any one has been guilty of negligence.

We have examined the testimony in the case offered by the plaintiff with a great deal of care and given consideration to the authorities and arguments urged by counsel for the plaintiff in error, and we are unable to find that the court erred in directing a verdict for the defendant.

The third ground of negligence, already discussed without mentioning it specifically, that the frog was not being raised in a proper manner, I need not discuss further. It seems to us that the work was being carried on in a proper manner and in the way that men of ordinary care and prudence would have carried it on, and that which occurred was an accident, and can not be denominated anything but an accident. Unfortunately, Scanlon was injured on account of it. We are unable to see any liability on the part of defendant, and the judgment of the court of common pleas is affirmed.

Orville S. Brumback, for plaintiff in error.

Emory D. Potter, for defendant in error.

QUESTIONS OCCURRING AT A TRIAL FOR HOMICIDE.

[Circuit Court of Lucas County.]

**ALBERT WADE v. STATE OF OHIO, AND BENJAMIN E. WADE v.
STATE OF OHIO.**

Decided, October 22, 1903.

Criminal Law—Confession of Defendant—Whether Made Voluntarily Shown at a Subsequent Trial of a Confederate—Dying Declaration—Statement not Made in View of Death, but Death Followed—Res Gestae—Statement by Accused Before Grand Jury—Facts Justifying a Verdict of Guilty of Murder in the First Degree.

1. A confession is voluntary, and is competent evidence against the person making it where it appears that no threats or promises were used in obtaining it, and that before the making of the confession the person to whom it was made, who was not an officer, informed the accused that he had no power to grant him immunity from punishment, but that if he wished he could speak.
2. Where a man charged with murder voluntarily goes before the grand jury and makes a statement of what he knows about the case and afterwards, during the trial at a preliminary examination had in the absence of the jury to determine the circumstances under which such statement was made and whether it was voluntary, testifies that his statement before the grand jury was true, and it was shown had been made with the knowledge, consent and under the advice of his counsel, evidence of his statements made before the grand jury is competent evidence against him upon his trial.
3. A verdict in a homicide case will not be set aside and a new trial granted on the ground that newly discovered evidence shows that a person who had been in the penitentiary was seen in the neighborhood at about the time the crime was committed, where there is no evidence that such person was implicated in or connected with the crime or had any knowledge of it.
4. Declarations made by a person shortly after an assault in which she received injuries which caused her death are not competent as dying declarations upon the trial of her assailants, where it does not appear that at the time of making such declarations she knew or believed that she was about to die.
5. Declarations made by the victim of a homicide some time after the assault which caused her death, at a house sixty rods distant from the scene of the crime, narrating certain facts in regard to the assault, are not part of the *res gestae* and are not competent evidence upon the trial of her assailant.

HULL, J.; PARKER, J., and HAYNES, J., concur.

The cases of *The State of Ohio v. Albert Wade* and of *The State of Ohio v. Benjamin E. Wade*, while not heard together, were heard one immediately after the other, and will be decided together. The two plaintiffs in error, defendants below, will be referred to here as the defendants. They were jointly indicted in 1902 by the grand jury of Lucas county for murder in the first degree. The charge was that these two defendants, together with Benjamin Landis—who was jointly indicted with them—while perpetrating a robbery, murdered one Katherine Sullivan. The defendants were tried separately and found guilty of murder in the first degree and sentenced to death. Petitions in error were filed in this court by each of the defendants to reverse that judgment.

The crime was alleged to have been committed in the evening of April 14, 1900, near the westerly limits of the city of Toledo, at or near a small place called Trilby. At that place lived Katherine Sullivan, and her sister, Johanna Sullivan, was visiting her at that time, in the little house where Katherine lived, some six or seven miles from this court house. They were elderly women—maiden ladies—and at this time were living there alone. At about 8 o'clock on the evening of April 14, 1900, being the night before Easter Sunday, Katherine Sullivan, the one who died, appeared at the house of Henry Wendt, a neighbor who resided about sixty rods from her house. She was badly injured, had been beaten about her head and body, and blood was flowing from her wounds; her clothing and her hair were saturated with it; her limbs still partially bound, and she was still partly gagged with strips of table-cloth. She called for help, and Mr. Wendt went out into the yard and brought her into the house. She was laid upon the floor, being in great agony, a physician was called, treatment given her, and some time the following morning she died. A post-mortem examination revealed many wounds on her head made with a blunt instrument, causing injury to the brain, which produced death. Her body was bruised, and her jawbone was broken, and there were two wounds in her throat, probably produced by the ends of the broken bones.

Johanna Sullivan, the other sister, about the same time Katherine reached Wendt's house, appeared at the house of Mr. Giles Pelton, another of her neighbors. She also had been beaten and wounded very seriously about the head and body, and was also covered with blood; and was partially bound at this time with strips of table-cloth. She was taken care of by Mr. Pelton, and soon after the neighbors were aroused and the Sullivan house visited. The kitchen of the house was found to have been the place where the murderous assault was committed. There were pools of blood upon the floor; blood dashed against the walls of the kitchen, and possibly some of it on or near the ceiling, a pool of blood being on the floor near the stove, where it afterwards appeared that Katharine fell. Two bloody clubs were found in the kitchen, made of green wood—the green limbs of trees, apparently—heavy and tough. They were covered with blood. They had been cut fresh and the bark peeled off, and were about the size of a policeman's club or "billy."

Some time later these defendants, while in the penitentiary for another offense, were indicted for this crime. They were indicted in 1901 or the early part of 1902. On account of some defect in the indictment they were again indicted in November, 1902. After the date of the homicide, the defendants, Albert and Benjamin Wade and Landis, had been sentenced to the Ohio Penitentiary for the commission of another crime—that of horse stealing—and were there together. Prior to the date of this homicide Benjamin Wade had been in the penitentiary twice. After coming out the last time he came to Toledo and there joined Benjamin Landis, in the fall of 1899, and for some time after—according to the testimony of Benjamin Wade given on his trial—he and Landis carried on a series of crimes in and about this county in the way of horse stealing, burglaries, chicken stealing and other crimes of that character. This was in the fall and winter of 1899-1900, during the few months before this murder was committed. A week or two before Katherine Sullivan was killed, Albert Wade, who was then at Kendalville, Indiana, and who had been in the penitentiary with Benjamin and Landis, came to Toledo at the request and solicitation of Landis and Benjamin Wade, they going to Indiana and

asking him to come to Toledo to aid them in their criminal enterprises that they were carrying on, he to receive a salary of so much per week, and his business to be that of disposing of, by way of sale and barter, the stolen plunder which they might accumulate. Nothing at that time, it is claimed, was said to Albert about any assault or robbery being contemplated upon the Sullivan sisters; and, yielding to their solicitations, contrary to the entreaties of his wife, Benjamin testified that Albert came with Landis and himself to Toledo, Landis returning upon a passenger train and the others upon a freight train; and about a week or so after that, this homicide occurred.

Considering first the case of Albert Wade, the brother of Benjamin, who was tried first below, it is claimed that error was committed against him in the overruling of a motion for a new trial on the ground of newly discovered evidence. An alleged confession of Albert Wade was admitted in evidence upon his trial over his objection—a confession made to Nicholas Miller, who had formerly been the Sheriff of Putnam County, Ohio. At the trial of Benjamin Wade, which followed that of Albert, Nicholas Miller, upon examination as a witness, it is claimed, disclosed that the confession of Albert Wade was made to him by reason of promises made and inducements held out to Albert Wade at the time he made this confession, and that was the chief ground urged for the granting of a new trial and for the reversal of the judgment by this court. There were other claims of newly discovered evidence that I will speak of later.

Nicholas Miller testified in the case against Albert Wade. He first met Albert in the penitentiary, although he had known Benjamin Wade before that time, and had seen him in different prisons and jails in northwestern Ohio. Benjamin and Albert were both in the penitentiary. Miller had heard of the Sullivan murder, and while he was sheriff of Putnam county, he met Benjamin Wade upon a train, Benjamin having been taken to some county to be a witness in a criminal case; and Benjamin asked Miller to come and see him at the penitentiary when he came to Columbus, and told him that he would "give him the Sullivan job"—using that language—if he came; that there was money in it for him.

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Subsequently Miller, whose term as sheriff had expired, went to Columbus, and called at the penitentiary and saw Benjamin, and talked with him, telling him that he was no longer sheriff, that he was not an officer, although he had been; that he had no power to promise any immunity or favor; that that could come only from the authorities of Lucas county, and especially from the prosecuting attorney. He had known Benjamin for a good while, however, and had seen him, and perhaps had had him in his custody once, and he advised Benjamin, if he was connected with the Sullivan murder, to tell all that he knew. At that time Benjamin asked Miller if he, Miller, thought he, Wade, was connected with the Sullivan murder, and Miller told him that he did. I am now speaking of Benjamin and not Albert, but this preceded the confession of Albert. Benjamin was doubtful whether the prosecuting attorney could grant immunity in a case of murder in the first degree, and disputed it, insisting that even if he did, the people would not submit to it. Miller insisted that the prosecutor had such power and discussed the matter with him. Benjamin seemed to understand the law, for he discussed it intelligently, and finally the attorney-general of the state was consulted, at the suggestion of one of these parties, he being mentioned in the discussion between Miller and Benjamin, and the attorney-general when consulted, stated that under the law the prosecuting attorney might grant immunity even in a case of murder in the first degree. Miller stated to Benjamin, however, that he had no power to promise him immunity; that that could only come from the Lucas county authorities, and that what he, Miller, wanted, as he put it, was "a land-mark" from one or the other of these men showing that they had knowledge of the Sullivan murder, in order that he might send for the prosecuting attorney and officers of Lucas county. Benjamin asked Miller whether there would be any difference in the immunity granted depending upon who told first; and Miller told him that in his judgment—and, perhaps, told him positively—that the one who spoke first would get the most immunity; told him that the authorities were anxious to convict Landis of this murder, and that if he and Albert told all that they knew, that in his judgment Benjamin would be let off with

a light punishment, but with a somewhat longer term of imprisonment than Albert, and Albert would get off with very little punishment, but telling him throughout the conversation from time to time that this must all come from the officers of Lucas county; and when he told Benjamin that the one who spoke first would get the most immunity, Benjamin said he wanted his brother to speak first, as he had a family.

Then Albert came into the office—Miller suggesting to Benjamin that he bring Albert—and Albert was brought in and introduced to Miller by Benjamin. After Albert's introduction to Miller there was a little further talk between Miller and Benjamin in the presence of Albert, but what that was is not clear from the record. Benjamin had brought Albert in, and he may have communicated to Albert what Miller had said to him, but upon that the record is silent; and Miller then spoke to Albert and told him, that he had no power to grant immunity, but if he wished to speak he could speak.

The talk between Albert and Miller before the confession was very brief. It might almost be said that the presumption from this record is that Benjamin had communicated to Albert the substance of what Miller had told him, and the prosecuting attorney said, in argument, that it might be so considered.

Finally Albert said "I saw the fatal blow struck." Miller said that is a "landmark," and advised him to tell all, saying that he would send for the Lucas county officers; that he had sufficient warrant to send for them. One of the Toledo detectives had been to Columbus prior to that time, and the Wades had refused to talk with him.

Thereupon Albert made a statement to Miller in the penitentiary in regard to the crime—a confession—and he told about his going to Toledo from Indiana; and after he had been here a short time, towards evening on Saturday, the night before Easter, 1900, he said he hitched up the horse to the buggy and he, Landis, and Benjamin started for the country, going about, here and there; that they got out before dark in the neighborhood of the Sullivan house; that one of them, Landis, went over to the Sullivan house for matches; that before that time they had gone to the woods and Landis had put

on a wig and a mask which disguised him, and which Albert said made him look "so funny." He said that in the woods they cut two clubs and stripped the bark off of them. That about 7 o'clock, or earlier in the evening, the three, Benjamin, Albert and Landis, went to the house of the Sullivan sisters; that they pushed open the door; that Benjamin Wade and Landis—whom they called "Frank"—rushed in. One of the sisters was at the door—either Benjamin or Landis going first—which, perhaps, is not very clearly shown; that the sister who came to the door was stricken down with a club; the other one, following closely upon the leader, attacked the other sister—and a terrific struggle ensued between Katherine and the man who attacked her, and finally the other one came to his help, and she was struck senseless and they both lay upon the floor. Albert claimed that he, all the time, stood at the door, and not taking any part in the actual assault upon the women. He spoke of their terrible cries while they were being beaten and gave the whole story of the murder in detail.

Miller telegraphed, or telephoned, at once to the prosecuting attorney of this county, and he went to Columbus with another officer of Lucas county on the following day and they met the Wades, Albert and Benjamin. The prosecutor, who regarded Landis as the leader, stated to them that if they would tell all that they knew about this crime, tell the whole transaction, and tell the truth, that he would save them from the electric chair. This is not disputed. Thereupon both Albert and Benjamin refused to talk, refused to make any statement to the prosecutor. Benjamin insisted—he seemed to take the lead—that he should be given his liberty before he talked; that he should have absolute immunity; that he should be released and held only as a witness; that he should be allowed to visit his wife, or the woman with whom he lived, at Dayton; that his freedom should be given him before he made any statement as to this case to the authorities. The prosecutor told him that he wanted nothing but the truth—that he wanted "no lies"—and the Wades became somewhat angry and refused to make any statement of the case to the prosecuting attorney.

On the trial of Albert Wade this confession was put in evidence by the testimony of Miller; but what Miller said to Albert and said to Benjamin in regard to the immunity that they might get from the prosecuting officers of the state, in his judgment, was not in evidence, Miller not testifying to it then, but did at the trial of Benjamin Wade, which followed that of Albert; and the testimony of Miller at the trial of Benjamin Wade, in which he testified to what he had said to Benjamin and Albert upon this occasion—the testimony of Miller at that trial was filed with an affidavit proving its authenticity, in support of the motion for a new trial of Albert Wade, on the ground of newly discovered evidence. There were some other affidavits filed to support the motion for a new trial of Albert Wade, showing that there was a man in that neighborhood about the time of the commission of this offense, by the name of William Brandt, who had been in the penitentiary; but there was no evidence that Brandt had committed the crime. There was one affidavit showing that the lock on the small house or shanty, or shed, near the Sullivan home was of an old make which would be difficult to open—there being testimony tending to show that the murderers went to this little house and got into it to get some money. This affidavit was made to Mr. Pelton and was filed as newly discovered evidence.

Going back to the Miller affidavit, or the affidavit showing Miller's testimony, in the Benjamin Wade trial, the question is, whether a confession made under those circumstances should have been admitted? It might be said that this was not newly discovered evidence; that Albert had full knowledge of all this during his trial, and that he had sat there and could inform his counsel; and that upon the preliminary examination, before the confession was admitted, he might have gone upon the witness-stand in the absence of the jury and have testified; but we are not inclined to draw the lines very strictly upon this in a capital case, and are asked by the prosecution to consider this question in the light of all the testimony which has been gathered together either during or after the trial of Albert Wade.

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A confession, to be admitted, under all the authorities, must be a voluntary one. If it is induced by promises made by an officer of immunity, or induced by threats or fear of injury emanating from an officer, it will not be admitted. If promises are held out and inducements made by those who are not officers and have no authority, then, whether the confession shall be admitted is a question of fact to be determined by the court—whether, under all the circumstances, the confession is voluntary or not. Or if in doubt, the court may submit that question to the jury with the alleged confession. The jury may be excluded, as was done in this case, by the court, and witnesses called before the trial judge to determine whether the confession was voluntary. And the defendant may call witnesses to show that it was not; and to exclude such testimony has been held error, and finally the question is decided by the trial judge under the evidence, as to whether the confession about to be offered shall be admitted or not.

A confession, if freely and voluntarily made, as laid down by all the authorities, is evidence of the highest character against the accused, if clearly proved, for it is his own statement of his connection with the crime with which he is charged. He, of all others, knows whether the charge against him is true or false, and if his statement is freely and voluntarily made, no better or more convincing evidence can be brought before a court or jury. But confessions that are not voluntarily made, or are produced by threats, by fear or by hopes, are excluded, on the ground, as stated by Greenleaf, that they are probably not true. There is a temptation for the accused to state, even against himself, that which is not true, where he has been induced to confess by hope or fear or by threats. And as stated by the Supreme Court of the United States, another ground for the exclusion is, that it is a violation of and an infringement upon the fifth amendment to the Constitution of the United States, which provides that no man shall be required to give evidence against himself. For, if he is required or compelled by threats or induced by hopes to make a confession against himself, it is an indirect method of compelling him to give evidence against himself, when statements made under

such circumstances are afterwards proven against him in court. But the fact that a confession is made to an officer does not exclude it under the law of this state. The fact that the confession, in his judgment, will be a benefit to the accused, or that it will be to his advantage to make a confession, does not exclude it. The fact that the statement was made to him by a private individual, not an officer, that it will be best for him to tell all, does not exclude it, if, after considering all of the evidence, the court can be satisfied that the confession was freely and voluntarily made.

A case in the 2d Ohio State, 584, *Spear v. The State*, discusses the subject of confessions. The opinion was by Judge Thurman. This is from the syllabus:

"No confession can be received in evidence in a criminal case, unless it was voluntary.

"A confession induced by hope or fear, excited in the mind of the prisoner by the representations or threats of any one, is not to be considered as voluntary.

"The question in every case, where a confession has followed representations or threats, is, was it produced by them?

"This question is to be decided by the judge, if proof of the confession, when offered, is objected to.

"In deciding it he is to have regard to the following rule:

"If the representations or threats were made by, or in the presence of a person having authority or control over the prosecution or the accused, it is to be presumed that the confession was produced by such representations or threats, unless it appear that their influence was totally done away before the confession was made. If, on the other hand, the representations or threats were made by a person having no such authority or control, and not in such presence, it is not necessarily to be presumed that they induced the confession.

"In the latter case, the judge is to determine how the confession was produced by looking at the circumstances, among which are the strength or weakness of the prisoner's intellect, his knowledge or ignorance.

"If satisfied, however, that the confession was produced by the representations or threats, the court can not receive it in evidence, because the prisoner had sufficient mind or knowledge to detect the groundlessness of the representations or threats; for the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to have believed, but what he did believe?"

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This case really covers the whole law upon this subject in this state.

There is a general discussion of this subject in the first volume of Greenleaf on Evidence. In Section 219 the author says:

“The rule of law, applicable to all cases, only demands that the confession shall have been made voluntary, without the appliances of hope or fear, by any other person; and whether it was so made or not is for him (the judge) to determine, upon consideration of the age, situation, and character of the prisoner, and the circumstances under which it was made.”

In Section 229, Vol. I, Greenleaf says:

“Though it is necessary to the admissibility of a confession that it should have been voluntarily made, as before shown, without the appliances of hope or fear from persons having authority, yet it is not necessary that it should have been the prisoner’s spontaneous act. It will be received, though it were induced by spiritual exhortations, whether of a clergyman or of any other person; by a solemn promise of secrecy, even confirmed by an oath; or by reason of the prisoner’s having been made drunken; or by a promise of some collateral benefit or boon, no hope or favor being held out in respect to the criminal charge against him; or by any deception practiced on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered. So, a confession is admissible, though it is elicited by questions, whether put to the prisoner by a magistrate, officer, or private person; and the form of the question is immaterial to the admissibility, even though it assumes the prisoner’s guilt.”

And in this state a confession has been properly admitted, although it was procured by a deception in stating to the prisoner that his accomplice had confessed. In 18 Ohio St., 419, the syllabus is as follows:

“In order to exclude the evidence of confessions by the defendant in a criminal case, it is not enough to show that they were made to an officer having him in custody, and were induced by a false assurance that an accomplice had given information of the crime, if it also appears that nothing was said or done calculated to induce a hope of advantage from confession, or fear of harm from its refusal.”

The doctrine in this case runs contrary to the doctrine of a case found in Vol. 168, p. 532, U. S. Reports (*Bram v. United States*), where it was held that the court below erred in admitting a confession or statement made to an officer. The prisoner in that case was charged with the commission of a murder upon the high seas, and when the vessel reached Halifax he was imprisoned and finally taken before a police officer and stripped—or while he was being stripped of his clothing was interrogated. This question was asked the officer, who was a witness:

“What did you say to him or he to you?”

And the witness answered:

“When Mr. Bram came into my office I said to him: ‘Bram, we are trying to unravel this horrible mystery.’ I said ‘Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.’ He said: ‘He could not have seen me; where was he?’ I said: ‘He states he was at the wheel.’ ‘Well,’ he said, ‘he could not see me from there.’ I said: ‘Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But, I said, ‘some here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.’ He said: ‘Well, I think, and many others on board the ship think, that Brown is the murderer; but I don’t know anything about it.’ He was rather short in his replies.”

“Q. Anything further said by either of you?”

“A. No; there was nothing further said on that occasion.”

Held:

“(1) That this statement made by the accused to a police officer was evidently not a voluntary confession, and was not admissible in evidence against him; (2) that the objection to its admission having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness.”

The above is from the syllabus.

Mr. Justice White delivered the opinion of the court and discusses the question at great length. The majority of the court held that this statement of the accused, made under these circumstances to an officer who stated to him, substantially, that

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his suspected accomplice had told that he had seen him commit the crime, he being at the time in custody, should not have been admitted. Chief-Justice Fuller, Justice Brewer and Justice Brown dissent from this opinion, Justice Brewer delivering the dissenting opinion.

The circumstances of this case are different from that reported in the Supreme Court Report, at least in this; that the person to whom the confession was made here was not an officer; had no authority over the liberty of Wade—no authority to do him harm or to give him favors, and that fact Miller had expressly stated to the Wades before the confession was made. Nor do we think that the law as stated in the majority opinion in *Bram v. U. S.* is the law of this state.

We are of the opinion that under the law of this state and the general law of the land, the confession of Albert Wade made to Miller in the penitentiary was properly received by the trial judge and should have been admitted, even if this testimony as to Miller's statement to the Wades, at the time of the confession, had been before the court. It was for the trial judge to say in the first instance, after he had heard all the evidence on this subject, in Albert Wade's case, whether the confession should be admitted or not. We consider the question in the light of the testimony of Miller at the subsequent trial of Benjamin Wade, and we hold that with that before the court the confession of Albert Wade would have been properly admitted. Miller testified in the Albert Wade case that he made no promises to Albert Wade, nor does he testify in Benjamin Wade's case that he made any promises to Albert Wade—he says he did not. He had his talk in the first instance with Benjamin Wade and he stated to Benjamin that he could make no promises; he stated what was usual and customary for the State to do in such a case in the way of immunity, and Benjamin Wade seemed to be familiar with the rule—where a man “turned state's evidence;” but Miller told them that he could not promise immunity; that he was not an officer and they must depend upon the action of the Toledo authorities for that. The evidence shows that when the prosecuting attorney and the officer came to Columbus and offered immunity, if they would make confession and furnish

evidence against Landis, that they refused to make a statement, and neither Albert nor Benjamin did testify in the trial of Landis. Albert seems to have been a man of sufficient intelligence to understand his situation. Both he and Benjamin Wade—and one of these men can not be discussed without the other, the cases are so connected—were anxious; they were afraid at that time that Landis would tell. This talking and this inclination to confess arose to a great extent from information that they got from time to time that Landis was threatening to “turn up the Sullivan murder”—to put it in the vernacular of these men—and “put it on” the Wade boys, and they were anxious to be the first to tell.

Where a crime like this is committed, in the night with no eye-witness but the criminals themselves, if the statement of one of those who was engaged in the crime can be secured by the State by fair and legitimate means, it is the State's duty and that of its officers to procure it. It is of the highest importance that the commission of such an offense be punished, and that no innocent man suffer, and we can have no higher guaranty that the guilty are punished than their own statements of their guilt, if they are freely and voluntarily made; and it appears to us that this confession is not open to the objection of the law that it was not a free and voluntary act of Albert Wade, taking into consideration all that occurred upon his trial, and taking into consideration further in his favor all that the records disclosed as occurring upon the trial of his brother, Benjamin Wade.

As to the other so-called newly discovered evidence in regard to William Brandt being seen in the neighborhood, that would not be sufficient to set aside the verdict; there is no evidence that Brandt was implicated in or connected with this crime, or had anything to do with it or knowledge of it.

Coming now to the case of Benjamin Wade—I may not touch upon every alleged error in these records and every point urged, but if I do not, it will not be because we have not considered them, for we have considered them all. The two chief grounds relied upon in this case for reversal are: First, the exclusion of the testimony of Henry Wendt as to the state-

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ments of Katherine Sullivan, the murdered woman, made on the night that she received her injury; and, second, in the admission of the statement of Benjamin Wade made before the grand jury that returned the indictment in November, 1902.

First, as to the exclusion of this evidence. It was to Wendt's house to which Katherine went after she recovered consciousness, perhaps an hour after the assault. Both of these women were unconscious for a time. Wendt was called as a witness and testified as to her condition and as to her cries for help. The defense called him as a witness when they came to offer their testimony and counsel asked him: "What did she say to you when she came there as to what had transpired at her house?" An objection was made to this question by the State and sustained by the court. Counsel for defense then stated: "We expect to prove that Katherine Sullivan came to Mr. Wendt's house about 8 or 8:30 and said that two men assailed her and beat her; that if there had been only one, she could have handled him, but she couldn't handle two; that she couldn't identify these men because they had masks on their faces." The objection was still sustained by the court.

It is claimed that this testimony should have been admitted, upon two grounds: that it was a dying declaration; and that it was a part of the *res gestae*. The ground most relied upon is the latter. It was not a dying declaration. A dying declaration is one made, as the courts say, *in articulo mortis*, and with the knowledge and belief that one is about to die. As stated by the Supreme Court in *Robbins v. State*, 8 O. S. Rep., 131:

"It is essential to the admissibility of dying declarations as evidence, that it should be made to appear to the court, by preliminary evidence, not only that they were made *in articulo mortis*, but also made under a sense of impending death, which excluded from the mind of the dying person all hope or expectation of recovery."

There is no evidence here that Katherine Sullivan at this time knew or believed that she was about to die; she did not die until the following morning. The declarations to be admissible must be made, as the authorities say, under the awful circumstances of impending death, and when the party himself knows,

or firmly believes that he is about to die, such circumstances being held to be equivalent to the binding obligation of a solemn oath; and the probability is that a person surrounded by such circumstances, about to be ushered into eternity, would tell the truth, that the probability is as great as it is where an oath has been administered. This statement was not made under such circumstances, and was properly excluded.

It is urged that it was a part of the *res gestae*—a part of the things done upon that night. Things that are said, words that are spoken in such close connection with acts done that they are a part of them, are admitted in evidence; they are not excluded as hearsay; they are regarded as the instinctive outbursts of the mind, and are to be considered in connection with the things that are done and as a part of them, "*res gestae*" meaning "Things that are done", as laid down in the law dictionaries. Anderson says in his law dictionary, page 887:

"*Res Gestae*. The circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. * * * The area of events covered by the term depends upon the circumstances of each case. * * * It is not possible to lay down a rule as to what is a part of the *res gestae* which will be decisive of the question in every case in which it may be presented by the ever varying phases of human affairs. Included in it are facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its true light and give it its proper effect."

In Abbott's Trial Brief, page 546, paragraph 266, the author says:

"The rule of the *res gestae* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it."

In Wharton's Criminal Evidence, Section 262-3, there is a discussion of this question. At the beginning of Section 262 the author says:

"*Res gestae* are events speaking for themselves, through the instinctive words and acts of participants when narrating the events. What is done or said by participants, under the im-

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mediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks."

It is claimed that this alleged statement of Katherine Sullivan was important because it is claimed that she stated then that there were only two men there, that two men assailed her; that she could have handled one, but not two, and that she could not identify these men. In our judgment, this declaration of Katherine can not be considered as a part of the *res gestae*. Those words were not the involuntary outburst of her heart or mind on that occasion. She was then in a house some sixty rods from the place where this crime had been committed about an hour before. Just how long she had been at Wendt's house does not appear; or whether this statement was made in answer to questions or not, and it is a narration, at all events, of what had occurred. These were not word facts, or verbal deeds; they were not connected with the transaction itself. It is not an outcry that she made as she was being assaulted, crying out that two men were assaulting her. In our judgment this can not be considered as part of the *res gestae*. If she had stated on that occasion that Benjamin Wade was one of her assailants and struck her, that could not have been admitted as against Benjamin Wade; it would have been error; it would not have been a statement by her made under oath nor under the belief that she was about to die, and to have admitted it against Wade would have been error. And besides the statement itself, in the light of all the testimony in the case, she might have made and been within the truth, as is shown by this record as claimed by the State. She perhaps only saw two men; one was outside. There were probably only two who committed the actual assault. She probably did not recognize them, as they all had masks on at the beginning, and, according to the testimony of Johanna Sullivan—the one who lived—the masks were not taken off until she and her sister both lay upon the floor, as they did, Johanna feigning death and having been pronounced dead by one of the murderers, and then, Johanna says, the masks were taken off and she recognized the defendants. So we hold that under the rules of law this testimony was not admissible. And, if it had been admitted, it would have been in the line of the truth of the transac-

tion as she saw it, and as the State claims—for the evidence does tend to show as I have stated that but two actually committed the assault and one was standing at the door, and if admitted it would in fact have been corroborative of the State's case rather than in opposition to its claims. So we hold that, upon the most liberal view, Benjamin Wade was not prejudiced by the exclusion of this testimony.

It is complained that the statement made by Benjamin Wade before the grand jury was admitted in evidence against him at the trial. The grand jury met in November, and it is claimed that this statement made before the grand jury was made because of the hopes and inducements and promises held out to him by various persons before he went into the grand jury room to testify. The grand jury met in November, 1902, over two years after this murder was committed. The talk to which I have referred, with Miller, had occurred at the penitentiary several months prior to that time. Wade had, on the next day when the prosecuting attorney came, refused to become a witness for the State unless he was given his absolute liberty. After being released from the penitentiary, having served out his time for horse stealing, he was brought to the jail of Lucas county. He was assigned as counsel, Mr. Mulholland and Judge Sala. An attorney from Findlay, Mr. Burket—who was interested in a murder case in another county that Landis had been implicated in or connected with in some manner with Marsh Lindsey, Ury and Foster—talked to him and urged upon him that it would be better for him to make a full statement of the facts; and Miller, and perhaps others did the same, and when the grand jury met he indicated his desire to appear before it and make a statement. He was asked if he wanted to talk with Burket, and he said "No; why should I when I have counsel?" He talked with his counsel, Mulholland, fully in the county jail, and discussed the matter with him, and under the advice of counsel adopted his course.

The prosecuting attorney, in order that no possible advantage might be taken of defendant, then in prison, had a subpœna issued for Mr. Mulholland, his counsel, to bring him before the grand jury; and in answer to that subpœna he came, and the

prosecutor then informed Mr. Mulholland that his client wished to come before the grand jury and make a statement and that they wished to ascertain whether he had any objections. Mr. Mulholland said that he had told Mr. Wade to use his own judgment in the matter, and when the officer went to the jail after Wade, he was found in consultation with his attorney, Mulholland; and with the advice that Wade got from Miller, from Burket and from his own counsel, and considering the question himself, he went before the grand jury; and there the statement was made to him by the prosecuting attorney that they were investigating his case, and that he might make a statement if he desired. Mr. Charles Sumner was then prosecutor. Wade was told that he could make a statement without questions being asked if he wished to, and he proceeded then to make his statement.

He made a statement as to his association with Landis in Toledo. He said he and Landis planned the crime two or three months before it was committed and went after Albert to help them "do the job"; said that on the evening the crime was committed he was not living at Landis' house, but that a few days before this crime was committed he had fallen out with Landis and left him and took no part in the crime; that on the evening that the murder was committed he came to Landis' house; that Landis came in at about nine or ten o'clock at night and Albert was there, and Benjamin made some statement as to Landis' bloody clothing and its being washed. He made a statement as to talks between him and Landis the next day, when an account of the crime appeared in the newspapers; that Landis told him and Albert at his house that the descriptions in the newspapers "tallied" with them and that they had better keep off the streets and away from his house; but Wade denied any guilty participation in this crime. He testified that on that night after Landis came in he became sick, or feigned sickness, and that he and Albert went after a doctor; that the doctor came and treated Landis, but that he and Albert went to a fire without going back to Landis' house. These are some of his statements made before the grand jury. There was no admission that he had any part in or connection with the crime. There was no

full statement of the truth, as had been asked by the prosecuting attorney at the penitentiary; it was an attempt simply to cast suspicion upon Landis; there was no positive evidence of Landis' connection with the crime, but he attempted to exculpate himself. This can not be called "turning state's evidence," as the expression is, under a promise of immunity from the State, which the courts have held should be carried out. He has never testified to the truth of this transaction. He never admitted that he was a witness to the crime or had any active part in it, or gave any positive evidence against Landis as to the commission of this crime except these circumstances to which I have referred. It seems to us that he went before the grand jury voluntarily, under the advice of his own counsel; that every protection was given to him that he could ask; that whether it would be to his advantage or not to go there and make a statement as he did, was a matter for the determination of his own conscience and his own judgment, and was so determined by him with the aid of his counsel.

When this statement made before the grand jury was offered in evidence at the trial, upon objection being made, a preliminary examination was had, in the absence of the jury, to determine the circumstances under which he had made it and whether it was voluntary, and these facts were brought out, and in fact, he himself went on the witness-stand at this preliminary examination—the jury being absent from the room, as stated; and at that preliminary examination, when under oath upon the witness-stand, he testified that his statement before the grand jury was true from end to end. Benjamin Wade never claimed, either on the witness-stand or off the witness-stand, that anything that he said before the grand jury was untrue; that he had been influenced by fear or induced by hope or promises to make one misstatement in the testimony that he gave before the grand jury. So that one of the objections to receiving confessions that are induced by hope or fear, is eliminated here, to-wit, that one, mentioned by Greenleaf, that they are not probably true—for the witness here reiterated the truth of his statement and swore to its truth upon his own trial. It seems to us that it would be a strange doctrine of

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law that where a man is charged with murder, if he has voluntarily and of his own motion gone upon the witness-stand before the grand jury and testified as to what he knew about the case, and afterwards, freely, voluntarily and of his own motion again upon the witness-stand at his trial had testified that what he had stated before the grand jury was true and that all this had been done with the knowledge, consent and under the advice of his counsel—it would be a strange doctrine of law to exclude from the jury such a statement when the man was on trial. We think that this statement was properly admitted by the court. Benjamin Wade testified in his own behalf upon the trial to substantially the same effect as before the grand jury. Benjamin also asked for a new trial upon the ground of newly discovered evidence, and filed the affidavit of H. L. Ramsey as to statements made by him to Benjamin in jail in regard to promises made through him by the prosecuting attorney to Benjamin before he went before the grand jury, but this was not newly discovered evidence in any sense of the word.

Benjamin knew all about this, if it ever occurred, at the time of his trial, and was a witness himself and did not mention it. A party can not withhold evidence in this manner at his trial and after verdict against him ask a new trial so that he may offer it at a second trial.

There remains only one question: Whether the evidence proves these men to be guilty of the crime of murder in the first degree? And, after all, that is the question that towers above all other questions in a criminal case. Upon the whole record, the consideration of it from beginning to end, has the defendant had a fair trial? Have his rights been protected? Is he guilty under the evidence and under the law, of the crime with which he is charged? Johanna Sullivan, who was left for dead by the murderers, lived and testified to all the details of this transaction. She and her sister were about to retire, or soon to retire, it being about 7:30 in the evening, and people go to bed early in the country. They were to retire soon after supper; and as a preparation for that, her sister was about to go out to the barn to see whether the live stock was in proper condition to

leave for the night. She went to the kitchen door and as she was about to go out she bid her good night—they seem to have been quite affectionate. Johanna undertook to open the door for Katherine, who was going out with the lantern. She found she was unable, for some reason, to get the door open, and finally Katherine took hold of it and pulled it open. They did not understand why it would not open as it was not locked; and as Katherine pulled it open from the inside, these three men appeared, and one of them, with his sleeves rolled up and a club in his hand pushed himself into the room and began an assault with a club upon Katherine. Another one came in after him and began an assault with a club upon Johanna, and Johanna testifies to this double assault; how her sister closed with one of the assailants and struggled with him near the kitchen stove, and struggled so that he finally called for help and the one who was beating her with a club and had knocked her down went to his aid, and between them they struck Katherine senseless. She told how they were bound hand and foot and gagged with strips of their table-cloth. She tells how she was struck until they thought she was dead, and one of them asked if she was dead, and the other answered that she was and struck her in the back with his foot and called her a vile name, saying that it was a good thing that she was dead. She states in detail what occurred when both were lying upon the floor apparently dead, and she testified that they took off their masks in the kitchen and she saw their faces. This scene seems to have made an impression upon her mind that time did not obliterate or make dim. She identified positively both of these men as being there in the commission of this crime; she identified both of them before they were brought to trial, when, for the purpose of ascertaining whether she could identify them, she was allowed to see each one of them with others and asked to "pick him out," which she did immediately. She identified them the first time she saw them after the commission of the crime and when she saw them in the court room when they were on trial, when she identified them again. It may be said that she might be mistaken. That is true; but the fact that she identified them outside of the court room and before the trial, when they

were not in custody, and not in chains or handcuffs so there could have been nothing to indicate who the prisoner was, the fact that she identified them then, promptly, is strong evidence that she knew the men—that she was not mistaken. A neighbor woman, a Mrs. Brock, testified that she was near the Sullivan house late in the afternoon or early in the evening of the day of the murder and saw Albert Wade in the vicinity of the house, near a little stream. Benjamin Wade, on divers occasions made statements to different people, especially in jail and when he was a prisoner, that indicated that he had guilty knowledge of this crime—made them to Sheriff Cliff and to Miller, and to prisoners in the county jail—Hageman, Hogan and others—made statements and partial confessions of his connection with and knowledge of this crime. Both Benjamin and Albert Wade made statements showing that Landis was one of those who committed this crime. Landis and Benjamin and Albert were engaged together in a partnership of crime in the city of Toledo just before the murder was committed. Benjamin testifies as to him and Landis riding around the city and in the country for miles in different townships, committing burglaries, stealing horses and other property and bringing it to a house in Toledo, where they lived, to dispose of it. They carried on a large business of this kind months before Albert came. I speak of this to show how intimately they were connected before this murder was committed. Benjamin and Landis had planned this crime long before it was committed, according to Benjamin's evidence, and they concluded that it needed three men and went to Kendallville, Indiana, to get Albert to aid them in the commission of the crime. He came here knowing that he was brought here to take part in the commission of crime—that he actually knew that he was to be engaged in this particular crime is not shown. Benjamin says he did not; but that he was to become a partner in a criminal business he knew, and his wife plead with him not to come. Benjamin testified that Albert came on a stated salary that he was to receive per week for performing his part in the criminal enterprises in which they were engaged. Landis and Benjamin Wade had long lived lives of crime. Benjamin had been twice in the penitentiary; he had

been confined in numerous jails. Albert had not lived such a life of crime, but had been in the penitentiary, and he came here, as I say, knowing that he was coming to aid in crime—Benjamin says to dispose of their stolen plunder as it was brought in by him and Landis. He consented to play his part in the commission of this murder after he reached here. While he may not have struck either of these women, according to his own statement he stood at the door. He was with the others in the woods when the fatal clubs were prepared with which the murder was committed; he was near the house, according to the testimony of Mrs. Brock, late in the afternoon. He knew what was to be done; he knew what these clubs were to be used for. He heard either Benjamin or Landis say as they entered that house: "Your money or your life!" and finally: "Your money and your life!" as Johanna stated. Although he was not steeped so deeply in crime as were the other two, although his life had not apparently been given over to crime to such an extent as had theirs, yet he was a participant in this crime as well as they, equally liable under the law and before this court.

I have not mentioned all the facts, but enough, and in the face of confession after confession, in the face of positive identification by Johanna Sullivan, in the light of all the surrounding facts and circumstances, it seems to us that the guilt of these men was proved beyond all reasonable doubt; that there is no room for question. They have no reason to complain of the trial that was given them, they were protected in all their rights, privileges and immunities and were fairly convicted of a murder as cold blooded and diabolical as any that ever stained the pages of the history of this country or of this state—a cruel, deliberate slaughter of a defenseless woman and an attempt to murder another, that they might gain for their reward a few dollars of the earnings and savings of these sisters.

The judgment of the court of common pleas in both cases will be affirmed.

Frank M. Sala, Frank Mulholland, Brand Whitlock and C. M. Milroy, for plaintiffs in error.

W. G. Ullery, Prosecuting Attorney, and *James S. Martin*, Assistant Prosecutor, for defendant in error.

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MORTGAGE NOT CONSTRUCTIVE NOTICE.

[Circuit Court of Cuyahoga County.]

THE WOOD SASH, DOOR & PAINT COMPANY V. A. W. BURROWS
ET AL.

Decided, November 23, 1903.

Record of Duly Executed Mortgage of an Interest in Land Under Contract is not Constructive Notice to a Subsequent bona fide Purchaser of the Premises.

Under proceedings for the sale of an entailed estate a trustee appointed by the court contracted to sell the premises to A, the contract being approved by the court; A mortgaged his equitable interest under his contract to plaintiff, the mortgage being executed and acknowledged, left for record and recorded, as required for deeds. Thereafter A assigned his contract to B and C, the court approved the assignment, the assignee complied with the contract, received the deed from the trustee which was confirmed by the court, and thereafter conveyed the premises to H without actual knowledge of the mortgage on the part of any of them. In an action to foreclose the mortgage. *Held*: That the mortgagee was not entitled to a sale of the premises.

WINCH, J.; HALE, & J., and MARVIN, J., concur.

Heard on appeal.

Thomas Bolton died years ago leaving certain of his real estate entailed. His executor began proceedings under the statutes regulating the sale of entailed estates, pursuant to which the court appointed Charles C. Bolton trustee, with directions that he plat and sell said real estate.

On October 8, 1897, said Charles C. Bolton, as such trustee, entered into a written contract for the sale to the defendant, A. W. Burrows, of a certain lot in the plat which he had made. The price of the lot was \$1,000 and the contract was signed by the parties to it and their signatures attested by two witnesses, but it was not acknowledged. This contract was reported to the court, duly approved and confirmed by it, ordered to be recorded on the records of said court, and thereafter duly recorded on said records.

Burrows took possession of the lot pursuant to the terms of his contract and began the erection of a dwelling house thereon. He had paid \$300 on the consideration named in the contract, and expended \$2,000 in the erection of said house, when, on March 3, 1898, being still in possession of said premises, he executed and delivered to plaintiff a mortgage on said lot to secure the sum of \$580 due for material and supplies therefore furnished by it towards the erection of said house. Said mortgage was executed in all particulars in accordance with Section 4106, Revised Statutes, and was duly left for record with the county recorder on the day it was executed, and thereafter by him duly recorded.

After the delivery and recording of said mortgage, but on the same day, Burrows assigned his contract for the purchase of said lot to the defendants, Clark and Benton, and delivered possession of the premises to them. This assignment of the contract was reported to the court, approved by it and the trustee was ordered to carry out the terms of the contract with Clark and Benton upon their fulfilling their part of said contract. This they did, paid the balance of the purchase price due thereon, and received from the trustee a proper deed of the premises, which they duly recorded.

Thereafter Clark and Benton conveyed said premises for a valuable consideration by warranty deed to the defendant, Grace Heyner.

Neither Clark and Benton nor Grace Heyner had any actual knowledge of the mortgage to plaintiff until after the transactions above stated.

Suit being brought by plaintiff to foreclose its mortgage, the only question presented for the consideration of this court is whether the record of said mortgage was constructive notice to subsequent *bona fide* purchasers of said premises without actual notice of the mortgage.

We think this case must be decided against the plaintiff upon the authority and reasoning of the case of *Churchill v. Little*, 23 O. S., 301, the syllabus of which reads as follows:

“When an executory contract for the purchase of land is assigned by the purchaser, either absolutely or as collateral

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security, and the assignee subsequently mortgages the contracted premises, the relative rights of the assignee and mortgagee are not determined by the fact that the mortgage was duly executed and recorded. In such case, and between parties thus situated, the act providing for the execution and recording of deeds has no application."

When the above case was decided the statute regulating the execution of instruments for the conveyance of land included only instruments by which land should be conveyed or otherwise affected or incumbered *in law*. The court held that an executory contract for the purchase and sale of land is not an instrument of that character. That though it is a legal instrument and forms the basis of legal as well as equitable remedies, it does not convey, or purport to convey, or *legally* to incumber or affect any estate or interest in the land.

The statute now in force (Section 4106) provides how "a deed, mortgage, or lease of any estate or interest in real property" shall be executed, and there can be no question that the chapter of the statutes treating on conveyances and incumbrances makes no provision for the execution of land contracts.

In said chapter Sections 4133 and 4134 provide that all mortgages and all other deeds and instruments of writing for the conveyance or incumbrance of any lands, tenements or hereditaments, "executed agreeably to the provisions of the chapter," shall be recorded, etc.

There being no provision in the chapter regulating the execution of land contracts, it follows that such contracts are not entitled to record. The contract between Bolton, trustee, and Burrows was not acknowledged, in itself a fact precluding its record. The contract not being entitled to record, it follows under the decision in the Churchill case *supra*, that the mortgage, "the instrument by which the contract is assigned, stands necessarily upon the same ground." *Churchill v. Little*, 23 O. S., 301-308.

Following the reasoning of the above case on page 310 of said report, if we are right in the above conclusion, the plaintiff, as well as the defendants, Clark and Benton, are to be regarded as the assignees of the equitable interest of Burrows,

and, as such, they stand upon the same footing, with at least this difference, that the assignment to the plaintiff was prior in time.

“The general rule in such cases is, that he who is first in time is first in right, but this rule is not of universal application. In a contest between equities it is not allowed to prevail where it appears from any fact or circumstance in the case, independent of priority of time, that the holder of the junior equity has the better right to perfect his equitable title or interest by calling in the outstanding legal estate. In such case he has the better equity. *Prima facie*, however, the assignee of an equity must abide the case with the assignor, and the superiority of the equity of the first purchaser is, in general, undeniable, unless he has been guilty of laches, which vitiates his title or deprive him of the right to enforce it against others who have been more vigilant.”

Confining our inquiries for the present as to the relations of plaintiff to Clark and Benton, was plaintiff guilty of any such laches as to deprive it of the right to enforce its mortgage against them?

It seems that plaintiff gave no notice of its mortgage to Bolton, trustee, neither did it report the mortgage to the court and ask for its approval of this partial assignment of the contract to it. The record of the mortgage was certainly no notice, constructive or otherwise, to the court or to Bolton, trustee, if he may be called the vendor. The better view of the case is that the court, not the trustee or officer appointed by it to make sale, is the vendor; but assuming that Bolton, trustee, was the vendor, there is no rule of law requiring a vendor to search the records for incumbrances by the vendee before deed is finally delivered pursuant to the contract.

Had plaintiff notified the trustee, actual knowledge of its claim would doubtless have come to Clark and Benton before the trustee accepted them on the contract with Burrows and before the court approved the assignment of the contract to them.

The plaintiff neglected to require Burrows to produce his contract with the trustee and deposit it with the mortgage; had this been done Burrows would have been unable to assign

the contract to Clark and Benton or they would have been put upon inquiry as to what had been done with the contract by Burrows.

Not only did plaintiff give the trustee and court no notice of its mortgage, but it at no time paid or offered to pay the balance due on the contract to the trustee.

Plaintiff took its mortgage as security for a pre-existing debt, and it would seem that by its laches it lost the better right it may have had by reason of its prior equity to perfect its title.

If then, as between plaintiff and Clark and Benton, the latter had the better right to call in the outstanding legal title, and did so, in how much better position is the defendant Grace Heyner, the present owner of the *legal* title, who is a *bona fide* purchaser for value and without notice of plaintiff's claims.

It remains to consider the contention made by plaintiff that Grace Heyner holding a title coming through the proceedings of the court for the sale of an entailed estate, by the record of such proceedings was advised that Burrows at one time had an interest in the property by the way of executory contract, and so was bound to search the records for conveyances and incumbrances by Burrows during the time that he held such interest. In other words the plaintiff urges the application of the rule of notice from *lis pendens*.

As we understand the doctrine of *lis pendens*, a pending suit is notice to all the world *during its pendency* of rights claimed by parties to the suit. Grace Heyner bought long after final order regarding this property, and when the record of the suit had to be examined by her it showed that the court had approved a contract with Burrows; that he had assigned said contract to Clark and Benton; that they had succeeded to all of Burrows' rights, had complied with the terms of the contract, became entitled to a deed and had received it pursuant to the court's orders. She found an adjudication of the court and a decree transferring the title to the property from the Bolton heirs to Clark and Benton. Burrows was as much concluded by this decree as anybody could be. In one sense, as purchaser under the order of sale, he was a party to the case and all his rights, including all rights granted by him during

the pendency of the case, were judicially determined therein.

Plaintiff acquiring its rights from Burrows during the pendency of this case which was *lis pendens* to it, could have applied to the court for an adjudication of its claims. By failing to do so it is bound by the final decree in the case vesting the title in Clark and Benton.

We find there is no equity in plaintiff's claim, and decree may be drawn accordingly.

Gibbons, Dunning & Tracy, for plaintiff.

Arnold Green, Squire, Sanders & Dempsey, Henderson & Quail, for defendants.

STREETS, SIDEWALKS AND CURB LINES.

[Circuit Court of Fairfield County.]

THOMAS B. COX, JR., v. CITY OF LANCASTER.

Decided, January Term, 1903.

Authority of Council to Prescribe Location of a Curb Line—Different from that Fixed by the One Laying out the Subdivision—Ordinances—Resolutions.

1. A resolution of a municipal council is effective to prescribe the portion of a street to be used as a sidewalk.
2. Where one lays out a subdivision to a city in which he indicates the location of a street, and by a line on the plat also indicates where the curb shall be laid, and this plat is accepted by a general ordinance, the city is not barred from thereafter locating the curb on a different line.

SIBLEY, J. (orally); VOORHEES, J., and DONAHUE, J., concur.

I need not take time to refer formally to the pleadings in the case. This is an action in equity seeking to enjoin the defendant, Cox, from proceeding to lay down a curbstone on a street in the city of Lancaster, which he had dedicated. The contention of the city is that his act is in derogation of its rights,

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as exercised by the council, in determining where the curb line of the pavement should be located and the curbstone placed.

There is no dispute as to the facts. It appears from the records and the evidence that some time previous to this period Mr. Cox made an addition to the city. In the plat filed, he not only indicated the lines of the street in question, but marked on the street a line for the pavement and showed where it should extend, and the curbstone line fall. On this line, afterward, and before the injunction was allowed he proceeded to put the curbstone.

This plat was accepted by an ordinance of the city, so as to make this a valid addition to the city of Lancaster. Nothing was specified in the ordinance in regard to the sidewalk. There is no claim here that the ordinance of acceptance was anything more than general in its terms. The contention by the defendant is predicated upon the proposition that an acceptance of the dedication, with the line of the sidewalk marked on the plat was tantamount to an action of the council making it the line of the walk. This is where the controversy lies in the first instance. Then it is further claimed by the defendant, that the resolution passed regarding the improvement of the street and marking out another curb line, varying a short distance from the one on the original plat of the addition, by not attempting to repeal or revoke what it is claimed was the effect of the former action, is void and of no effect; hence that it does not entitle the plaintiff to relief such as it seeks in debarring the defendant from laying the curbstone on the line of the plat.

I think this is a sufficient statement. I may say, however, there is no claim here that if the resolution had been an original action in the matter of establishing a sidewalk, it would not have been sufficient for its purpose.

This resolution of the council falls, as we think, in that class of municipal legislative action that may be done by resolution as well as by ordinance. It is of a permanent nature; it does not operate temporarily; it operates until some further action is taken to revoke it. It is local also, relating as it does to a street in one portion of the city. Hence, it comes within that policy of the municipal statutes of the state as to giving notice to those

only who may be affected by that form or mode of action.

On the other hand, in the case of an ordinance, in order to render it effective for the purposes for which it may be designed, it must be published.

We think it was within the proper legislative authority of the council to prescribe the portion of the street which shall be used for a sidewalk, and that this resolution is effective for that purpose, if the contention with regard to the dedication, and the acceptance by the council, does not affect the resolution in consequence of its not having revoked the earlier action.

This depends, we think, upon a single proposition; that is, whether one who is to make an addition to a city, in which is included a street, can only dedicate a portion of his land for street purposes, or can dedicate it specially as a sidewalk. It is perfectly settled that a sidewalk is a part of a street, and that the control of the city council over the streets and sidewalks alike is plenary, without any limitation except such as is imposed on the general powers of the body.

How is it now under the statute in respect to a dedication? What may a man dedicate in a street? Can he so dedicate it as to determine what part shall be apportioned to the street, and what to a sidewalk, thereby in effect doing for the street in respect to its improvement and use what the statute exclusively empowers the council to do? It is not contended by the defendant that this can be done against the will of the council. The proposition is that having accepted the dedication with a line marked indicating the sidewalk, this is equivalent to an act of the council approving what was done by the owner of the land in fixing that as the line of the sidewalk. But we do not reach that conclusion. The section in regard to dedication is Section 2597, Revised Statutes, as follows:

“Section 2597. When any person wishes to lay out a hamlet or village, or subdivision or addition to any municipal corporation, he shall cause it to be surveyed, and a plat or map of it made by a competent surveyor; in which plat or map shall be particularly described and set forth the streets, alleys, commons, or public grounds, and all in-lots and out-lots and fractional lots within or adjacent to such hamlet or village, the description to include the courses, boundaries and extent.”

To us it seems as if the full extent of the power of one making an addition has been exercised when he simply dedicates land for street uses. In order to make the contention of the defendant good, he must be able to go further than a general acceptance—must show an ordinance which in effect, if not in terms, makes it clear that the council in its action intended to make a line indicated upon the plat the line of its sidewalk in the division of its street.

Here the terms of the ordinance are general. The city council can not be barred from its right to control the streets, unless it has done something by ordinance which would require a revocation or repeal. Can it be said in reason, that simply because the party indicated on a plat, that which the law required him to make out, when there is no provision for his marking the line of a sidewalk, that the city council in accepting the street thereby fixed that line as the line of the walk? We think no such effect can be given to the acceptance unless the action of the council is definite and clear.

That does not so appear in this case. Therefore the defense sought to be made fails. Consequently the relief which the city seeks by injunction against further action in putting the curbstone on the line indicated upon the plat, rather than the line required by the resolution, should be granted.

The judgment of the common pleas court is therefore affirmed.

FALSE ANSWERS IN AN APPLICATION FOR INSURANCE.

[Circuit Court of Lucas County.]

NORTH AMERICAN ACCIDENT INSURANCE CO. v. FRANKLIN D. SICKLES.

Decided, July 1, 1902.

Insurance—Section 3625, Relating to False Answers in Application, Construed—What the Company Must Establish to Avoid the Policy—Authority Constituting a Solicitor an Agent.

1. Under the saving provisions of Section 3625, an insurance company in order to avoid a policy, on the ground of false answers in the application, must establish clearly that the answers made by the insured were willfully false; that they were fraudulently made; that they were material; that they induced the company to issue the policy; that but for such answers the policy would not have been issued; and, that the agent of the company had no knowledge of the falsity or fraud of such answers.
2. Where a sub-agent, appointed by a general agent whose territory covers several counties, and who has authority to appoint sub-agents, solicits insurance, and fills in the application for a policy in the presence of the applicant, after a conversation with him disclosing all the facts bearing upon the statements to be made in the application, and the statements written in the application are the suggestion of said sub-agent, and there is reason to believe the facts were also all made known to the general agent, the knowledge of such sub-agent as to the extent the statements were false is the knowledge of the company.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

This suit was begun by Franklin D. Sickles against the North American Accident Insurance Company on a policy of insurance on account of an accident which he averred had happened to him resulting in an injury, for and on account of which he claimed something less than \$300. His action was commenced in the city and justice court of this city. He obtained judgment there against the insurance company, and the company appealed the case to the court of common pleas, where it was tried to a jury, resulting in a verdict in favor of the plaintiff for \$237.72. Motion for a new trial was filed and overruled, and judgment was

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entered upon the verdict, and the insurance company prosecutes error to this court to reverse that judgment.

It is averred in the petition that on June 27, 1900, the plaintiff was insured by this insurance company against accident and against bodily injury which the plaintiff might receive when caused solely by external, violent and accidental means; that the company agreed to pay him the sum of fifty dollars per week, not exceeding 104 weeks consecutively, where the injury which he might receive wholly and continuously disabled him from transacting any and every kind of business; that he paid the insurance premium required; that on September 6, 1901, while riding as a passenger upon a public conveyance, to-wit, a steamboat, on Lake Erie, he received bodily injuries, caused solely by external, violent and accidental means, in that he accidentally fell in said boat and received such injuries as that immediately following the receipt thereof he was wholly and continuously disabled from transacting any and every kind of business up to and including October 5, 1900, to-wit, twenty-nine days, and was partially disabled from performing labor and transacting business from October 5 to October 9, to-wit, four days. The policy seems to have made provision for the payment of a smaller amount for the period that he was only partially disabled. The total amount of his claim was \$221.34 and interest.

An answer was filed, and afterwards an amended answer, in which amended answer is averred that, "previous to effecting said insurance, viz., on or about the twenty-seventh day of June, 1900, the said Franklin D. Sickles stated in an application upon which said policy was issued and which was the basis of and a part of the contract between this defendant and the said Franklin D. Sickles, amongst other things, the following: 'I am not carrying nor have I applied for any other accident insurance except the amount herein written.' Also the following: 'No accident insurance company or association ever rejected my application, canceled or requested the surrender of my certificate or policy, or declined to renew the same, except as herein written.' And also the following: 'I have never had paralysis, fits of any kind of brain disorder, diabetes, hernia, varicose veins or any bodily or mental infirmity, injuries or wounds, or suffered

the loss of a limb or an eye, nor has any application for life insurance ever been rejected, postponed or not acted upon, except as herein written.' " And the defendant says "That said application contains no other statements concerning the aforesaid subjects therein by the said Franklin D. Sickles mentioned as aforesaid." And that "the plaintiff had been afflicted with paralysis, vertigo and other serious bodily infirmities and injuries, caused by a previous accident to him; that plaintiff was carrying other accident insurance and that he had been refused further insurance by other insurance companies to-wit, The United States Casualty Co. of New York city; that the aforesaid statements made by plaintiff in said application were willfully false and fraudulently made, were material to said risk, and induced said company to issue said policy, and that but for said statements said policy would not have been issued, and that neither said company nor its agents had knowledge of the falsity or fraud of said statements at or before the delivery of said policy."

These averments were denied by a reply, and upon these issues the parties went to trial.

It appeared upon the trial that this insurance was solicited by a Miss Dittenhaver, who claimed that she was representing the company, and that she brought to the plaintiff below the blank application and sat down with him to fill it out, and that a part of the writing in the application, or the most of it—and especially the parts relied upon here as a defense—were written by her after some discussion of the questions and the proper answers which would be made to the statements appearing in the application. The application is in somewhat peculiar form, perhaps not unusual—it is not in the form of questions and answers, but is rather in the form of affirmative statements, with blanks and provisions for exceptional or explanatory statements, the design apparently being that if there are no exceptional or explanatory statements required, nothing shall be written except the signature of the applicant for insurance. But when these persons sat down to make it out, to these affirmative statements they have added, where perhaps it was not necessary, certain negative and affirmative answers, as if the statements were rather questions than affirmative statements.

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Those that are especially relied upon and discussed here are statements Nos. 10 and 15 in this application. No. 10 is: "I am not carrying nor have I applied for any other accident insurance, except amount herein written." That is printed in the application, and at the end of it is written the word "No." No. 15 reads: "I have never had paralysis, fits of any kind, or brain disorder, diabetes, hernia, varicose veins, or any bodily or mental infirmity, injuries or wounds, or suffered the loss of a limb or eye, nor has any application for life insurance ever been rejected, postponed or not acted upon, except as hereinafter written." And written below that is the word "No." The signature is that of the plaintiff, Franklin D. Sickles. It appears from the evidence that at the time this application was made out (about the twenty-fifth or twenty-seventh of June, it bears date the twenty-fifth) Dr. Sickles had a policy of like character in force with the United States Casualty Company, but that the policy would expire by limitation upon the first day of July or the thirtieth day of June of that year. It appears that he stated this fact and that it was well understood by Miss Dittenhaver, who was assisting in the making out of this application, and who had solicited the insurance of the doctor. But it also appears that it was understood and contemplated between them that the new policy, that is to say the policy being applied for, would not take effect until after the expiration of the policy in the United States Casualty Company, and that this application was being made out in anticipation of the other policy expiring by limitation within a few days. Though this policy was in fact dated the same as the application, that was not according to the understanding or the contemplated action of the parties. The intention of the parties was to have one policy begin at the expiration of the other; the policy, however, was not delivered to the insured until the expiration of the policy in the United States Casualty Company. It also appears that during the period that the doctor was insured in the United States Casualty Company he received an injury through an accident, and that on account of this injury he received \$137 by way of indemnity from the United States Casualty Company. This fact was not concealed from Miss Dittenhaver—she knew all about it—she

and the doctor talked about it, and the character of the injury that the doctor sustained upon that occasion appears to have been fully explained by the doctor to Miss Dittenhaver. She so testifies, and the doctor so testifies, and that is not denied; and in this application this appears under item 14:

“I have never at any time received indemnity for disability or other loss, except as herein written.”

And “No” is written at the end of that; and also this: “\$137 in casualty.”

Now there was some evidence introduced on behalf of the insurance company to show that the injury which the doctor received in this accident while he was insured with the casualty company was of the character of paralysis; that he fell, and as a result of the fall his lower limbs were affected by numbness and loss of motion and with a loss of control over them temporarily, and some of the physicians who testified state that this was in their opinion temporary paralysis; but there is no testilike paralysis at the time he applied for this insurance in the money tending to show that the doctor was afflicted with anything North American Accident Insurance Company, but the testimony that he had fully recovered from his former injury stands practically undisputed. As to whether the injury that he had received on this former occasion resulted in partial or temporary paralysis, there is some dispute and some doubt; some of the testimony tending to show that the result was simply a temporary numbness, not in that degree that could be fairly characterized as “paralysis.” Now it is contended by the insurance company that since the facts which I have said were stated to Miss Dittenhaver—all these facts of the fall which resulted in numbness and disability, etc., were not set forth in this written application—therefore the insurance policy was null and void *ab initio*, and that they have made out their defense. And that contention is based somewhat upon the provisions of this application and the policy with respect to the character of these statements and representations and the effect that they shall have upon the insurance. I read from the application:

“I hereby apply for insurance in the North American Accident Insurance Company, to be based upon the following, viz.:

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Classification of my occupation; the statement of facts herein, whether written or printed, in response to interrogatories or otherwise, all of which I warrant to be true and complete," etc.

And further, after the answers and before the signature, is this:

"This application, with its statements, stipulations and warranties, together with the premium paid by me, shall be the basis of and a part of the contract between the company and myself. I understand the classification of risks, and agree that for any injury, fatal or otherwise, received in any occupation, risk or exposure classed in the company's manual as more hazardous than the class named in the policy to be issued hereon, I, or my beneficiary shall be entitled to only such amount as the premium paid will purchase at the rate fixed for such increased hazard; I agree that the company shall not be bound by any knowledge of or statement made to or by any solicitor, unless written hereon; that I will notify the secretary should I hereafter procure additional accident insurance," etc.

It is contended by the insurance company that Miss Dittenhaver was not the agent of the company, but that even if she were the agent of the company, by reason of this stipulation of warranty and by reason of the further stipulations and agreements that the company was not to be bound by any knowledge of or statements to or by any solicitor, unless written herein; that they are not bound or affected by the oral statements of the doctor to Miss Dittenhaver, which were not written in the application. The policy contains this stipulation or agreement:

"In consideration of the warranties, stipulations and agreements contained in the application for this policy, which application is made a material part hereof, and of the premium of six dollars, does hereby insure," etc.

So that it will be seen that the application is made part of the policy as fully as the parties by their contract could make it a part.

It is contended on behalf of the defendant in error, however, that Section 3625, Revised Statutes, has an effect upon this contract; that the statute nullifies the stipulation that these answers shall be regarded as warranties and that the company is not to be bound by any knowledge of statements made to or by any

solicitor unless written upon the application. Before this section was made a part of the law, the case of *Insurance Co. v. Pyle*, 44 Ohio St., 19, was considered and decided by our Supreme Court, and it was held as follows:

“The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void *ab initio*, by the terms of the same and the failure of warranty.

“When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answers or statement, or by any fraud, misrepresentation, or concealment, ‘the policy shall be absolutely null and void;’ and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the policy does not attach, but it is void *ab initio*.”

Subsequently this statute was passed, which provides as follows:

“No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or to be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and moreover, that the agent or company had no knowledge of the falsity or fraud of such answer.”

It is contended, however, by the insurance company that this section does not apply where the parties expressly stipulate, as they have done in this case, that the answers are to be regarded as warranties and that the company shall not be bound by any knowledge of the statements made to or by the solicitors, unless written upon the application. but that it is intended to apply to cases where the contract is silent upon this subject.

In the case of *John Hancock L. Ins. Co. v. Warren*, 59 Ohio St., 45, it is held:

“Section 3625, Revised Statutes, is a valid constitutional enactment; and to constitute a defense to a policy of insurance by reason of false answers to questions in the application, it must be clearly proven that the answers to such questions were willfully false and were fraudulently made; that the same were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued; and that neither the company nor its agents had knowledge of the falsity or fraud of such answers at and before the delivery of the policy.”

Which seems to amount to saying that it is a valid constitutional enactment, and means what it says, for this syllabus is practically a transcript of the statute. And we have this by the court, upon page 53:

“Section 3625 was in force at the time this policy of insurance was issued, and therefore the legal effect is the same as if the section was copied into and made a part of the policy.”

And the same may be said, therefore, of the case at bar, to-wit: Section 3625 being in force at the time this application was written and at the time this policy was written and issued, it must be considered to have the same legal effect as if it was copied into and made a part of the policy. The court further says, on the same page:

“The case of *Insurance Co. v. Pyle*, 44 Ohio St., 19, was decided before this section was enacted, and therefore can not control the matter. This section was passed for the purpose of abrogating the rule laid down in that case.”

Now it seems to us that the rule for which counsel for the insurance company is contending here is substantially and practically the rule laid down in the case of *Insurance Co. v. Pyle*, *supra*, and that it is a rule which the Supreme Court says has been abrogated, purposely, by Section 3625, Revised Statutes, and we think what was said by the Supreme Court in the case of *Insurance Co. v. Leslic*, 47 Ohio St., 409, 414, with respect to Section 3643, Revised Statutes, is applicable to life insurance companies and may be very properly said of this statute, viz.:

“The foregoing sections of the statute being in force when it [the policy] was issued, they entered into, and became part of

the contract of insurance, fixing the measure of the obligation created by it, and controlling its construction and operation."

And the following from page 417:

"The statute can not, we think, be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions embraced in the policy inconsistent with the provisions of the statute are subordinate to it and must give way."

It is true, as pointed out by counsel, that in this case of *Hancock L. Ins. Co. v. Warren*, *supra*, it was said by the court that the insurance company failed to allege that the answers to the questions were material, and without such allegation the answer failed to state a ground of defense, and it matters not how false or how fraudulent such answers may be, if they are not material, they furnish no ground for defense to the company issuing the policy. But, while this is said, the decision does not appear to be based upon that, and the law of the case, as we understand it, is what we find stated in the syllabus, which I have read. The court point out that they had not made a complete answer; that the answer perhaps is subject to demurrer—does not state a complete defense—yet the decision is not based upon that; and we can not see that if that matter had been stated in the answer it could in any way have affected or modified the statement of the law as given in the syllabus.

We hold, therefore, that it devolved upon the defendant to establish clearly that these answers made by the plaintiff were willfully false; that they were fraudulently made; that they were material; that they induced the company to issue the policy, and that but for such answers the policy would not have been issued, and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answers. We fail to find anything in this record that satisfies us, or that we think should satisfy any trier of the facts, that any of these answers or any of the omissions or statements by the way of explanation were fraudulently made or fraudulently omitted. The conduct of the

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insured in this transaction appears to us, from the record, to have been entirely fairminded so far as we can see, and therefore we think that under the statute the mere omission of statements or a mere error in statements could not affect the validity of the policy; that the charge of the court upon this subject was correct; that the court was right in refusing to charge the several requests numbered 3, 4, 5 and 6 submitted on behalf of the insurance company.

We think, too, from a careful reading of this record (and I shall not stop to discuss the testimony or read it), that the jury was warranted in finding that Miss Dittenhaver was an agent of the insurance company; that William L. Hoyt, the general agent residing here—the general agent for Ottawa, Fulton, Henry, Sandusky and Lucas counties, had authority to appoint sub-agents, and those sub-agents, acting under his direction and supervision in soliciting insurance, represented the insurance company, and that to that state of facts the law as laid down in *Insurance Co. v. Williams*, 39 Ohio St., 584, is applicable, to-wit:

“A soliciting agent, procuring for an insurance company risks and applications on which policies are issued, who fills up the application, is, in so doing, the agent of the company and not of the insured; and if the agent make a mistake in wrongly stating facts which were correctly given him by the insured in preparing the application, the company is bound by and responsible for such mistake.”

And we think that this last clause of Section 3625, Revised Statutes, to the effect that the mistakes, errors or even fraudulent statements in the application shall not vitiate the insurance if the agent or company had knowledge of the falsity or fraud of such acts, is applicable. The charge of the court upon that subject appears at page 44 of the record, and has our approval. It is as follows:

“There has been some discussion as to whether the lady who obtained this application from the plaintiff was an agent of the company within the meaning of this statute. On that subject I have this to say to you: If Mr. Hoyt, the district manager of this company here in Toledo, authorized her to obtain applications for policies, and the applications so obtained by her were

received by the manager and forwarded to the company, and policies were issued thereon by the company, then she was the agent of the company in taking such applications, and any knowledge on her part as to the falsity of the statements in the application, if there was such falsity, would be regarded as knowledge of the company. If either of these statements was false and fraudulently made, and it is not clearly proved that neither the company nor the agent knew that it was false or fraudulent, then the defense is not made out. But if each of the facts mentioned in the statute is clearly proved then the defense is made out, and the plaintiff is not entitled to recover."

And we think the evidence in this case clearly establishes a state of facts which required the jury to give an affirmative answer to the proposition embodied in this charge, to-wit, that she had such authority and did exercise such function and was so recognized by Mr. Hoyt and the company as that she became the agent of the company.

Now, this is perhaps all that is necessary to be said to dispose of the questions raised here by the plaintiff in error, and yet we make this further remark upon the record: That we think from the evidence the jury was fairly justified in finding—whether they did so find or not, of course we can not tell, because there was no special verdict—but they were fairly justified in finding that these facts with respect to the policy existing at the time this application was made, and with respect to the injury which the doctor had received and the compensation he had received on account of that injury, and the effects of the injury, were made known to Mr. Hoyt before this policy was delivered. We think if the case were to rest upon that issue that it is fairly sustained by the insured, that the burden being upon the insurance company, it has failed to establish that these facts were not made known to Mr. Hoyt before the policy was delivered.

Upon the whole, it seems to us that this verdict was right and that no error occurred upon the trial of the case prejudicial to the plaintiff in error, and that the judgment should be affirmed, and it is, therefore, affirmed.

Chittenden & Chittenden, for plaintiff in error.

Orville S. Brumback, for defendant in error.

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ALIMONY.

[Circuit Court of Muskingum County.]

WILLIAM S. LEMERT V. AMELIA LEMERT ET AL.

Decided, October Term, 1903.

Alimony—Judgment for—Not Barred by a Discharge in Bankruptcy—Does not Become Dormant from Failure to Cause Execution to Issue—Collection of, Can not be Defeated by Injunction.

A judgment or lien for alimony is a continuing and subsisting claim against the husband; it does not become dormant, is not affected by proceedings in bankruptcy, and injunction will not lie to prevent its enforcement.

MCCARTY, J.; VOORHEES, J., and DONAHUE, J., concur.

The case of William Lemert against Amelia Lemert et al is an action which came into this court on appeal from the court of common pleas. The action was commenced in that court for an injunction to prevent, by restraint or otherwise, the collection of a judgment for alimony granted some time ago by the Franklin County Common Pleas Court. In 1899, a suit was brought in Franklin county by Amelia Lemert against William S. Lemert for divorce and alimony. In that proceeding the divorce was granted, and alimony was allowed in the gross sum of one thousand dollars. Subsequently, and since the passage of what is called the bankruptcy law of 1898, an action was commenced by William S. Lemert in the federal district court, praying for a discharge in bankruptcy, and such proceedings were had in that court and under that petition and application for discharge, that he was, subsequently to that time, discharged in bankruptcy, and received a certificate in the ordinary form discharging him from all liability from debts. It will be remembered that the divorce and alimony proceedings was commenced and determined in the Court of Common Pleas of Franklin County long before the proceeding for the discharge in bankruptcy took place. Two serious and important questions here arise, (1) as to whether that claim for alimony was provable in the bankruptcy proceeding, and (2) as to whether that claim

for alimony did not become dormant by reason of the lapse of time from the time judgment was obtained until the proceedings were commenced for its enforcement and execution.

It is said that in the proceeding in bankruptcy a list of claims and debts was filed by Mr. Lemert, and when the time came for hearing and passing upon those claims and debts he was finally discharged, and was, therefore, relieved from the burden of paying them, or any part of them.

In 1898 this bankruptcy law was passed, since which time an adjudication has been had upon this identical question in the Supreme Court of the United States, and is reported in *Auduban v. Shufeldt*, 181 U. S., 575. The syllabi of the case and opinion delivered by Mr. Justice Gray are as follows:

“Neither alimony in arrear at the time of adjudication in bankruptcy nor alimony accruing subsequently thereto is a provable debt in the sense of the bankruptcy act of 1898, or barred by a discharge.”

On page 579 in the opinion, a case is cited with approval, decided in 1900, *Barclay v. Barclay*, 184 Ill., 375 [56 N. E. Rep. 636], and in that case “it was adjudged by the Supreme Court of Illinois that alimony could not be regarded as a debt owing from husband to wife which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy, and the court said: ‘The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provisions prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony can not be regarded as a debt owing from the husband to the wife, and, not being so,

can not be discharged by an order in the bankruptcy court.' ”

It is contended in argument here that the district court of the southern district of Ohio passed upon the jurisdiction and determined that this was a provable claim, from which the defendant was subsequently discharged by the certificate in bankruptcy. We think that the Supreme Court of the United States, having this identical question before it, determined that it was not a provable claim, and if it was not a provable claim the adjudication of the district court would be of no effect. The decision of the Supreme Court of the United States is, in substance, that the statute providing for bankruptcy proceedings, the filing of claims, and adjudication upon them, does not require, and does not allow, the proof of claims for alimony.

We are aware that some portions of the decision in the case of *Conrad v. Everich*, 50 Ohio St., 476, have been criticised by the Supreme Court of Ohio, but not the portion I here read :

“It is contended in argument that alimony is not a debt, and if not, that it is difficult to see how it is a lien unless expressly made so by the court. But, in *Lockwood v. Krum*, 34 Ohio St., 1, it is well said by Boyton, J., in delivering the opinion of the court: ‘The claim for alimony rests on the common law obligation of the husband to support his wife in a manner suitable to his condition and station in life during the existence of the marriage relation. And this obligation is as binding after the commission by the husband of a marital offense entitling the wife to divorce, as before. In respect to such obligations, she may well be held to be a creditor of the husband.’ In *Chase v. Chase*, 105 Mass., 385, it was held that a judgment for alimony in the case of a divorce *a vinculo*, or from bed and board, creates a debt of record in favor of the wife, and that she is entitled, as a creditor, to impeach a conveyance made by him with intent to defraud her. It is said by the Supreme Court of the United States in *Barber v. Barber*, 62 U. S., 582, 595, that when the court having jurisdiction of her suit allows the wife from her husband’s means, by way of alimony, a suitable maintenance and support, ‘it becomes a judicial debt or record against the husband, and is as much a debt of record, until the decree has been recalled, as any other judgment for money is.’ ”

And it is the duty of the husband to provide proper maintenance and support for his wife, before and after the decree of divorce.

We think the authorities conclusively determine (1) That this was not a provable debt; (2) That the court did not have jurisdiction in the matter to determine that it was so, and thereby undertake to discharge the plaintiff in this action from that obligation.

As to whether or not the judgment became dormant. An adjudication of alimony by a court of common pleas is, in a sense, a judgment, to the enforcement of which the parties are entitled to execution and proceedings in aid thereof. A claim for alimony—while it is a judgment, the fixed amount of which is to be paid by the husband out of his property for the support of the wife, rests not only upon the adjudication of the court fixing that amount, but upon the higher obligation of the common law liability of a husband to support his wife, and the authorities go so far as to say that it is a continuing obligation which exists not only at the time of the judgment, but continues afterward.

We are of the opinion that this judgment or lien is a continuing, subsisting claim against the husband; that it has not become dormant, and is not affected by the proceedings in bankruptcy; and that this petition for injunction, the object and prayer of which was to restrain and prevent the enforcement of the claim for alimony, should be dismissed.

A. J. Andrews, for plaintiff.

F. F. D. Albery, for defendant.

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NEW MUNICIPAL CODE — POLICEMEN AND FIREMEN.

[Montgomery County Circuit Court.]

THE STATE OF OHIO, ON THE RELATION OF CHARLES A. SNYDER,
AS MAYOR OF THE CITY OF DAYTON, OHIO, v. CHARLES S.
HALL AND EDWARD G. DURST, AS DIRECTORS OF PUBLIC
SAFETY, CONSTITUTING THE BOARD OF PUBLIC
SAFETY OF THE CITY OF DAYTON, OHIO.

Decided, January 2, 1904.

Municipal Code—Provision Regarding Policemen and Firemen—Forbidding Removal or Reduction in Rank or Pay—Was Providing for an Emergency—Not an Exercise of the Power of the Appointment—And Not in Contravention of the Constitution.

1. The provision of Section 167 of the New Municipal Code (96 O. L., 20) that "no officer, secretary, clerk, sergeant, patrolman, fireman or other employe serving in the police or fire departments of any city of the state at the time this act goes into effect, shall be removed or reduced in rank or pay except in accordance with the provision of this act," is not in contravention of Section 27, Article II, of the Constitution inhibiting the exercise of the appointing power by the General Assembly.
2. The New Municipal Code was enacted upon the assumption, based upon the decisions of the Supreme Court respecting special legislation, that the acts under which our municipalities were organized were invalid, and in order that as little hardship and inconvenience as possible might result from reorganization, the General Assembly provided that the officers and employes of the police and fire departments under the new code should be appointed from those serving in the departments at the time the new code took effect. It was providing for an emergency, not exercising the power of appointment.

SUMMERS, J.; SULLIVAN, J., and WILSON, J., concur.

This is a proceeding in mandamus. The petition is as follows:

"Charles Snyder, relator herein, states that he is the legally elected, qualified and acting mayor of the city of Dayton, Montgomery county, Ohio, in which capacity he brings this suit in the name of the state. The defendants, Charles S. Hall and Edward G. Durst, were duly appointed directors of public safety

on the — day of May, A. D. 1903, the city council of said city having fixed the number of directors for said city at two by ordinance duly enacted, and said defendants have entered upon their office as such directors, and now constitute an organized and acting board of public safety in said city, in which capacity they are made defendants. Said city contains over eighty thousand inhabitants.

"Prior to the enactment providing for the organization of cities and villages, passed October 22, 1902, the police force of the city of Dayton was organized and operated under the act of March 8, 1887, providing for the establishment of a non-partisan police in the cities of the state of the second grade of the second class, and the subsequent amendments thereto. The city of Dayton was then, under the existing classification of cities, a city of the second grade, second class, and remained in such class as the only city of that class and grade until the passage of the law of October 22, 1902, which repealed all laws providing for the organization of such cities, including the law of March 8, 1887, and all the amendments thereto. By an amendment to said law of March 8, 1887, passed March 17, 1892, to provide for the more efficient government of cities of the second grade, second class, four police directors were put in control of the department of police instead of four police commissioners, in whom this control was put by the law of 1887. Such police directors were appointed by the tax commission provided for such cities by the act of March 17, 1892, and the office of police commissioner was abolished.

"The law of March 8, 1887, created an office called superintendent of police, who was to be appointed by the said board of police commissioners, as provided therein, and later by the board of police directors, as provided by the amendment of March 17, 1892. In both laws there was provision for the appointment, in a similar manner, of a captain of police, with other subordinates in the department.

"Under the provisions of the law of March 8, 1887, as amended, the board of police directors of the city appointed John C. Whitaker, Superintendent of Police on the 21st day of February, A. D. 1901, for the term of one year. At the expiration of said year, about the 26th day of February, 1902, the said board re-appointed said Whitaker to the same position, the term not being designated but left indefinite. Under such appointment the said Whitaker was duly qualified and entered into the said office and upon the performance of the duties and obligations annexed thereto, and continuously acted as such superintendent of police until the law of October 22, 1902, above

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referred to, took effect, when the said office was abolished, and all the laws providing for the government of cities of the second grade, second class, were repealed or superseded, including all the laws above referred to, except said law of October 22, 1902.

"After said law of October 22, 1902, went into effect, the city council of the city of Dayton, Ohio, to-wit, on the — day of May, 1903, duly passed an ordinance for the organization of a police force of the city of Dayton, in accordance with its provisions. In such ordinance there was provision for a chief of police at a salary of \$2,500 a year, the previous salary of the superintendent of police having been the sum of \$2,500 a year; and provision for one captain of police at a salary of \$1,200 a year, and other subordinates, such as detectives, sergeants, patrolmen, etc. There was no provision in said ordinance, or any other ordinance, making the chief of police the successor in any way of the superintendent of police, nor vesting in him any of the powers of such superintendent, nor submitting him to any of his obligations, nor in any way defining the duties of such chief of police; and while the duties devolved upon the chief of police under the general provisions of the law of October 22, 1902, were and are, to some extent, similar to those imposed upon the superintendent of police by the former statute referred to, yet the powers and duties were not the same, and the offices were different offices, as an inspection of the statutes will show.

"Notwithstanding all of the above facts, the said Whitaker, after the law of October 22, 1902, went into effect, entered into and upon the office of chief of police, performing its duties, and assuming its obligations, and he has continuously acted as such chief, in said office up to the present time, with the exception of a brief period during which he did not so act, claiming to be such chief. He was not appointed to said position by the mayor of the city, the relator herein, nor by any authority in the city of Dayton. The said Whitaker has taken no steps to bring himself within the classified service of the said department of public safety, and has submitted to no examination.

"The relator avers, upon the advice of his counsel, that the law in force at the date of the appointment of Whitaker, as stated, was unconstitutional and void; that said police directors were not, in law, officers of the city of Dayton; that the law creating the office of superintendent of police was not a valid law and did not establish such office, and that in right there was no such office or officer as superintendent of police at any time during his acting as such alleged officer.

“The relator avers further that on December 14, 1903, upon the advice of his counsel, he declared the said office of chief of police to be vacant, and immediately sent a formal notification of the fact of vacancy to the defendants as members of the board of public safety, requesting them to forward and submit to him the names of three persons qualified to receive and accept the appointment as such chief of police under the laws of the state, and the regulations of the board pursuant thereto. The said board held its regular meeting on the evening of December 14, 1903, to which was duly presented the request of the relator as mayor. At said meeting, it refused to recognize the existence of such vacancy, or to forward and submit any names to your relator from which to choose a chief of police; and such board will continue to refuse to submit any names out of which the relator, as mayor, may make a proper appointment, unless ordered by the court so to do, on the ground that no vacancy exists.

“Relator avers that it is a duty enjoined by law upon the defendants, as the board of public safety, to present to him the names of three persons from the classified service from which he shall select a chief of police; and in the ordinary course of law he has no adequate remedy against them for such refusal.

“Wherefore, the relator prays that the defendants, Charles S. Hall and Edward G. Durst, as directors of public safety, and members of the board of public safety, be compelled to transmit and submit to him, as mayor of the city of Dayton, Ohio, the names of three persons in the classified service of the said city, qualified to be chosen as chief of police; that an alternative writ of mandamus may first issue to them requiring them to show cause, by a day to be named therein, why they do not transmit and submit to him the names of three persons qualified to receive and accept said appointment as chief of police; and on the final hearing that a peremptory writ be issued to compel the defendants, as such board, to submit and transmit the names of such persons. And he prays for such other or further relief as the nature of the case may require.”

Upon motion for allowance of an alternative writ it was suggested that the allowance and issuing of an alternative writ be waived, and that was done.

The answer is quite lengthy, and I do not think it necessary to read it verbatim. I have read the petition, because it is a succinct statement of the legislation that is necessarily under consideration in this case.

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The answer admits many of the statements of fact set out in the petition, and then denies each and every other allegation, and then sets up at some length acts of the mayor in recognizing Whitaker as the chief of police; and then comes this averment:

Defendants further say that said board of public safety within thirty days after the organization of such board, did classify all offices and places of appointment and employment in the department of public safety in said city, in conformity with the ordinance of the council of said city determining the number of persons to be employed therein, and did immediately thereafter furnish to the mayor, the relator herein, a list of all said places of appointment and employment in any way connected with said department within the classified service, together with the names of the incumbents, their compensation and the nature of their duties; that said John C. Whitaker was named in such classification as chief of police and his salary as such chief of police was fixed at \$2,500 per year, and he was to perform all of the duties incumbent upon him as the chief of police of said city; and said John C. Whitaker has ever since been addressed and designated and recognized and empowered to act as such chief of police of said city in all official communications by said relator as such mayor, and by said board of public safety, and has performed the duties of said office under the direction of said relator as such mayor, and said board of public safety.

Defendants further answering say that said relator, as such mayor, has a full, complete and adequate remedy at law.

Defendants further allege that as there was no vacancy nor any prospect of a vacancy in the office of chief of police, no examination has been held of the applicants for said office, and that no register of candidates for the office of chief of police exists from which names could be certified even if there were a vacancy in such office; and defendants further allege that they have had under consideration the rules governing the police department but that they have not all yet been completed or formulated, and that thus far no rule or rules have been made providing for the promotion of members of the police force from the classified service of the department of public safety of said city.

Wherefore, defendants ask to be dismissed with their costs.

To this answer a general demurrer was interposed and the case is submitted upon the general demurrer to this answer.

The principal contentions upon the part of counsel for the relator are that all laws relating to cities of the second grade of the second class, including that referred to, that is, the act of 1887, relating to the organization of the police department in the city of Dayton, under which Whitaker was appointed superintendent of police, are unconstitutional, and that an unconstitutional law is void.

“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby County*, 118 U. S., 425-442.

That the law, being unconstitutional, there never was any such office as superintendent of police, and that, inasmuch as there must be a *de jure* office in order that there may be a *de facto* officer, Whitaker was not even a *de facto* officer at the time when the new code went into effect, and that therefore he was not entitled by virtue of that act to the office of chief of police—first, because he was not in office when the code took effect, and second, there being no such office, the code did not merely continue an office already in existence, or continue him in an office which was already in existence, but that it repealed the former law and created a new office, and attached new duties thereto, and that Section 167, in so far as it provides that persons in office or employment shall remain in, is unconstitutional in that it attempts to exercise the power of appointment, contrary to the express provision of Section 27 of Article II of the Constitution. That the classification of municipal corporations, under which Dayton was a city of the second grade of the second class, is unconstitutional is said to be put beyond question by the two cases in the 66 Ohio State, pages 453 and 491.

We do not think the Supreme Court has anywhere held that there can be no constitutional classification of cities by the Legislature, nor is it certain that the act in 84 Ohio Laws, page 52, being the act of 1887, providing for a police force in the cities of the second grade and second class, would be held unconstitutional. Similar acts, too numerous to mention, have been sustained; we need refer only to the case of *Seifert et al v.*

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Weidner et al, 55 Ohio State, 646, affirming 12 Ohio Circuit Court, page 1, and to the case there referred to.

But assuming that it would be so held, we are not willing even to conjecture as to the extent of the mischief that would follow if all that has been done under such legislation must be declared illegal. If this legislation is to be held void from the beginning, then the acts of all who acted under it were illegal, for there being no *de jure* office, they were not even *de facto* officers.

So far as contract rights are involved, the rule that should govern is, in our judgment, laid down in *Douglas v. Pike Co.*, 101 U. S., 677. Reading from page 687, Mr. Chief Justice Waite says:

“The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative enactment; that is to say, make it prospective, but not retroactive. After a statute has been settled by a judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.” See also *Shoemaker v. Cincinnati*, 68 O. S., 603.

How far that rule may be extended we do not undertake to determine.

The sections necessary to be considered are so numerous that that I do not know, in the absence of a memorandum and time to prepare one, that I can refer to them in the order in which they should be noticed, to make plain the conclusion we have reached, but referring to the code, I refer to it by section and number.

Section 146 provides that in every city there shall be a department of public safety, which shall be administered by two or four directors, as council shall by resolution or ordinance determine.

Section 147 provides that all powers and duties connected with and incident to the appointment, regulation and government of the police and fire departments of the city, together

with the regulation and control of the fire alarm telegraph and telephone system, shall be vested in the mayor and the board of public safety, as hereinafter provided.

Section 149 provides:

“The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station-house keepers, drivers, and substitutes, as shall have been provided by ordinance or resolution of council.”

Section 148 provides:

“That the chief shall be the executive head of the department, under the direction of the mayor; provided that the chief shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as may be prescribed by the board of public safety.”

Section 152 provides:

“That the chief of police and chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in their respective departments and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause.”

I think we may assume that the office created by this act is a public office, and the chief of police a public officer. That would seem to follow from *State, ex rel. v. Jennings*, 57 O. S., 415.

Now we have found that the code provides for a police department, for its control by the board of public safety, that it specifies what the force shall consist of, and what the duties of the chief are. The next question that would arise is: How is this police force to be constituted or appointed? It will be noticed that it says it shall be composed of the chief of police and such captains and lieutenants, etc., and patrolmen and other officers as shall have been provided by ordinance or resolution of council.

It appears from the facts admitted in the pleadings that the council of the city of Dayton, since the adoption of this code,

has by ordinance provided for these officers and employees. Now, how are they to be appointed? Section 153 provides:

“The directors of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments and for the qualification and examination of all appointees thereunder, except as otherwise provided in this act.”

Section 158 provides:

“That the board of public safety shall, within thirty days after the organization of such board, classify all officers and places of appointment and employment in each city in the department of public safety with reference to the examinations herein-after provided for. The offices, employment and places so classified by the said board of public safety shall constitute the classified service of the department of said city, and no appointments to such places shall be made except under and according to the rules hereinafter mentioned.”

The section further provides:

“Immediately upon the classification of such department, such board shall furnish to the mayor a list of all offices, employment and places in any way connected with such department within such classified service, with the names of the incumbents, their compensation and the nature of their duties; and said board shall from time to time promptly furnish to the said mayor, in writing, at his request, all other information desired by him for the proper fulfillment of his duties.”

Section 167 provides:

“No officer or employe in the department of public safety shall be removed or discharged except for cause; and the cause city of the state at the time this act goes into effect, shall be by the mayor to the board, and shall be filed by the said board in its office, and shall be open to public inspection.

“No officer, secretary, clerk, sergeant, patrolman, fireman, or other employe serving in the police or fire departments of any city of the state at the time this act goes into effect shall be removed or reduced in rank or pay, except in accordance with the provisions of this act.”

It will be noticed that the petition avers that the council passed an ordinance creating the department and specifying of

what it shall be composed. The answer admits that the ordinance was passed, then avers that within thirty days after the appointment by the board of public safety the members of that board did classify the offices as provided by Section 158, and that immediately upon the classification of said department they furnished the mayor with a list of all the offices and places of appointment and employment in any way connected with the department, as provided for by ordinance, with the names of the incumbents, their compensation and the nature of their duties, and that Whitaker was named as chief of police, and his salary was stated, and that he entered upon the discharge of the duties of the office, and has ever since continued to perform the duties of that office.

The contention of counsel for the relator is that this provision, that is, the latter clause of Section 167, which I read, and which reads, "That no officer, secretary, clerk, sergeant, patrolman, fireman, or other employe serving in the police or fire departments of any city of the state at the time this act goes into effect, shall be removed or reduced in rank or pay, except in accordance with the provisions of this act," was an appointment of the old members of the police force to positions in these new offices or places created by the code, and that the Legislature, under Section 27 of Article II of the Constitution being prohibited from exercising appointing power, it necessarily follows that this provision of the code is unconstitutional and void, and that therefore Whitaker is not entitled to claim that he is an incumbent of or in the office of chief of police.

After considering all of the provisions of the code that relate to the creation of the police and fire departments, giving them the best construction of which we are capable, the conclusion which we have reached is that what was intended by the code was not that under this clause that I have just read, every member of the police force or every member of the fire department in office when that code went into effect was entitled to remain a member of the police or fire department created by the ordinance, but that the intention of the Legislature was that the council should by ordinance provide a police and fire department, and determine the number of employes or places

that there should be to fill—that number might be considerably less than the number that were in existence under the old law—and that when council had determined the number of places, that then the board of public safety was to classify those places and to fill those places by naming the persons who were then members of the old police and fire departments, who should fill the places in the new department created by the ordinance, and that that was in effect what they did when they complied with this provision of Section 158, “immediately upon the classification of such department, such board shall furnish to the mayor a list of all offices, employment and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation and the nature of their duties.”

The effect of that was to vest in the board of public safety the power to appoint the chief of police and the officers and employes of the police department from those who were members of the police department at the time the code went into effect. If there were one hundred and fifty patrolmen under the old law, and but a hundred places for patrolmen created by the ordinance passed by the council, the board of public safety would designate a hundred out of the hundred and fifty old patrolmen, and they would be the patrolmen under this new code, and under the ordinance providing for the police department. In other words, the effect of this was, as I said before, to vest in the board of public safety the power to make these appointments from the old force.

Now as to the provision for appointments in the future in case of vacancies in the force, how are the offices to be filled? The list is to be made up of persons who have taken the examination, and in cases of vacancies, the mayor notifies the board of public safety and they are required to certify three names to him, and from the names so certified, he is to make the appointment. But it is clear that this provision as to examination does not apply to the men who were in office at the time the new code went into effect.

Reference is also made to Section 213—

"All officers elected by the people or appointed by any authority, and all employes under any boards or officers in any municipal corporation, and all officers or employes in any educational, charitable, benevolent, penal or reformatory institution in any such corporation, now serving as such, shall remain in their respective offices and employments and continue to perform the several duties thereof under existing laws, and receive the compensation therefor until their successors are chosen or appointed and qualified, or until removed by the proper authority, in accordance with the provisions of this act."

It is contended, I believe, that under this provision, Whitaker's term of office would have expired and there would be a vacancy. We do not think that section controls. The special sections to which I have already called attention are the ones that control in the police department. This is a general section which is to control generally where no specific or special provision is otherwise made, and has no application here.

The question then arises whether or not this is the exercise of the power of appointment by the General Assembly. The view we take is that clearly this legislation is not appointive. These men were not in by virtue of the provisions of the law, but the board of public safety was to designate who was to fill these places, and the question then would be whether or not this provision of the Constitution was violated by the Legislature, limiting the selection to those who were already officers or patrolmen or employes of the police department in existence when the code went into effect; and it might be claimed that there being but one superintendent of police, one chief executive officer of the department, that the Legislature gave the board no discretion, no chance of selection, but required them to appoint Whitaker, and might as well have named Whitaker. This contention, however, we think is disposed of by *Gleason v. Cleveland*, 49 Ohio State, 431, where the General Assembly directed the governor to appoint eleven persons to act as a commission for the erection of a monument, I believe in Cleveland. There were only twelve persons, out of whom he was to select eleven. The contention was there made that that was the exercise of the appointing power by the General Assembly, that

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it was obnoxious to this same constitutional provision. But the court, in the opinion, page 437, say :

“The objection that the persons composing the commission created for the erection of the monument are officers virtually appointed by the Legislature, and that the act is therefore unconstitutional is, we think, untenable. If they are officers within the meaning of the Constitution, the direction for their appointment by the governor from ‘the present monumental committee of The Cuyahoga County Soldiers’ and Sailors’ Union,’ is impersonal, and does not require the appointment of specific persons; whoever, at the time the appointment is made, compose that committee may be appointed by the governor, whether they were such members at the passage of the act or not.”

It does not follow that Whitaker would necessarily be the appointee. If Whitaker had died prior to the taking effect of the code and his successor had been appointed, then it would have been his successor who would have been the chief, or whoever was in office at that time. Counsel criticizes the case, and we are not disposed to take exception to their criticism. It is said that it is not in point for the reason that this case is based on the ground that these persons were not officers. But it is apparent from what I have read that that can not be so. The decision is upon the assumption that they were officers.

I refer to the case of *Fosdick v. The Village of Perrysburg*, in the 14th Ohio State, reading from page 482. I do not know that it has any bearing, but it is interesting in view of the fact that there the action of the General Assembly in undertaking to create or classify municipal corporations under the provisions of the Constitution when it came into effect, was under consideration, and the court says, or the judge delivering the opinion, Judge Brinckerhoff, I believe :

“The corporate life of the village of Perrysburg was a continuation of the life of the town of Perrysburg. It was a continuation; not an annihilation and a re-creation. Even the official designations of the officers respectively of incorporated villages organized under the general act were the same as under the special acts organizing them as ‘towns’; they were still a mayor, recorder, and trustees, which, together, constituted a council (Section 47). And the officers in office at the time of the

taking effect of the general act, were, under its provisions, continued in office until the first Monday of April following and until their successors should be elected and qualified."

The old laws relating to municipal corporations were repealed. The law went into effect on the 15th day of May, 1852, I believe, and by force of this act of the General Assembly all the old city officers were continued in their places until the following April, nearly a year. That is attempted to be done under the provisions of the act under consideration here.

At the time the application was made for leave to file a petition, or for the allowance of an alternative writ, the court intimated a doubt as to the right to proceed in mandamus. That question we have not examined, for the reason that upon examination of the whole case we are clearly of the opinion that the effect of the legislation is as I have indicated; that is, to vest in the board of public safety, in the first instance, the power to make the appointments from the existing police force, or from the persons in office at the time of the passage of the code; and whether they were *de jure* officers or *de facto* officers we think is wholly immaterial. It was in the power of the General Assembly to provide for their appointment in the way it was done, and for these reasons the demurrer to the answer will be overruled.

McMahon & McMahon, for plaintiffs.

Edwin P. Matthews, City Solicitor, *Philo G. Burnham*, Assistant City Solicitor, *Conrad Mattern* and *S. A. Dickson*, for defendants.

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Lucas County.

LIEN OF JUDGMENT CREDITOR.

[Circuit Court of Lucas County.]

ALBERT V. BAUMAN ET AL V. EDWIN D. GOULET ET AL.

Decided, October 31, 1903.

Lien—Of Judgment Creditor—Saved from Becoming Dormant—By Answer and Cross-Petition in Foreclosure Suit—Filed Within Five Years of the Date of the Judgment—The Rule in Dempsey v. Bush—Execution.

Where one owning a living judgment, which is a lien on lands, is made a party defendant and enters his appearance in an action to foreclose a mortgage which is an inferior lien upon said lands, the petition in which case contains the averment that such defendant claims some interest in or lien upon said lands, and contains a prayer that he may be required to answer and set up whatever interest or lien he may have or be forever debarred from asserting the same; and also for a marshalling of liens, a foreclosure of plaintiff's mortgage, a sale thereunder, etc., the priority of the lien of such judgment is preserved in the proceeds of a sale made in said action, if an answer and cross-petition setting the same up and asking appropriate relief touching the same is filed in the case within rule, though it may not be filed until more than five years from the date of such judgment, and no execution has been issued thereon during such period.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This case comes into this court by appeal, and the question we have to dispose of arises upon a demurrer to the answer and cross-petition of Willard F. Robison. The action of the plaintiffs is to foreclose a mortgage upon certain premises. Willard F. Robison, it appears, recovered a judgment against Henry H. Cushing, who at one time was the owner of these premises, the judgment having been recovered November 15, 1897. Afterward Edwin D. Goulet became the owner of the premises and mortgaged them to the plaintiff. Within five years of the date of the judgment recovered by Robison the petition in foreclosure was filed by the plaintiff. Robison was made a party defendant, and it was averred in the petition with respect to him that he had or claimed a lien upon the premises, to-wit:

“Plaintiffs further say that the defendants, Willard F. Robison, A. V. Bauman and E. B. Smith, trustees of the Imperial Savings Co., and J. H. Krause claim some interest or liens on the real estate described herein, of the exact nature of which these plaintiffs are not advised, but which they say are inferior to the liens of plaintiffs herein; that they, therefore, pray that they may be required to answer and set up whatever interest or liens they may severally have in or to the real estate described herein, or be forever barred from asserting the same.”

There is a general prayer for the marshaling of the liens, the foreclosure of the mortgage, sale of the premises, distribution of the proceeds, etc. As I say, Robison was made a party defendant within five years of the date of the recovery of his judgment against Cushing and he entered his appearance to the suit, from which it should be assumed, and is assumed by counsel in argument, and will be assumed by us as one of the facts in the case, that he became a party and came into the case to all intents and purposes upon the date that the petition was filed, which was October 20, 1902. He filed his answer and cross-petition upon his judgment upon December 17, 1902, which was something over five years from the date that he obtained his judgment. A demurrer to his cross-petition is filed by the plaintiff. The contention is that not having had any execution issued upon his judgment within five years from the time of its recovery, which is one of the conceded facts in the case, and not having filed his cross-petition upon his judgment within five years from its recovery, the lien of the judgment is lost. The statutes bearing upon this subject are as follows: Section 5375 provides that a judgment shall be a lien upon the lands of the judgment debtor in the county where the judgment is recovered, from the first day of the term at which the judgment is recovered—that is, a judgment of an ordinary character and of the character of the judgment recovered by Robison in this case. Section 5380 provides:

“If execution on a judgment rendered in any court of record in this state, or a transcript of which has been filed as provided in Section 5367 be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued on such judgment and the time

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of suing out another execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

It is upon the terms of this statute that the plaintiff demurring relies. An important exception has been, as we may say, engrafted upon the statute by a decision of the Supreme Court in the case of *Dempsey v. Bush*, reported in 18 O. S., page 376, and the whole matter is stated in the second proposition in the syllabus:

"In an action to subject mortgaged land to sale, and to ascertain and marshal the liens thereon, a judgment creditor, who was properly made a party while his judgment was alive, will not lose his right to share in the distribution of the money arising from the sale, by the fact that his judgment became dormant pending the action."

Now it is conceded by the plaintiff that the rule as broadly stated in that syllabus, if applied to this case would require the overruling of this demurrer; but he insists that that proposition of the syllabus shall be read in the light of the facts in that case and that the rule is too broadly stated; and the particular fact in the case which he insists modifies or qualifies the rule is that in that case a cross-petition upon the judgment lien was filed within five years of the date of the recovery of the judgment, and counsel call attention to certain utterances of the Supreme Court which seem to give some color to the argument that some of the court at least have regarded the rule as being stated too broadly in this case of *Dempsey v. Bush* and have regarded the filing of the cross-petition (where a defendant seeks to preserve or enforce his lien) and within five years from date of judgment or execution as an important element necessary to preserve the lien of his judgment. In the case of *Fort, Sadler & Bailey v. Casper Litmer*, reported in the 31st O. S., 215, Judge Gilmore, in delivering the opinion, says with reference to this proposition in *Dempsey v. Bush*:

"The second proposition of the syllabus in this case is cited by the plaintiffs in error in support of the motion. Although the language used in this proposition is somewhat broader than was necessary for the decision of the case then before the court,

still it is not broad enough to cover the claim of the plaintiff in this case, by any fair construction."

In *Fort v. Litmer*, 31 O. S., 215, the rule in *Dempsey v. Bush* is stated with the qualification that the party shall file his cross-petition before the expiration of the five years, and it is stated as if that were one of the elements of the rule, whereas it is not so stated in the case of *Dempsey v. Bush*. Quoting from *Fort v. Litmer*:

"In such a case it has been held that a defendant holding a judgment lien, which becomes dormant *after the filing of his answer setting it up*, will be protected," etc.

That, of course, is consistent with what is held in the case of *Dempsey v. Bush* and consistent with the facts in that case, though it suggests a qualification of the rule as stated in that case. Reading from the opinion of Judge White in *Dempsey v. Bush*:

"The land sought to be subjected to sale was, at the commencement of the suit, subject to two mortgages and a large number of judgments liens. By the records, the judgment in favor of Ross' executors was prior to plaintiff's mortgage; but, by agreement between the parties, the mortgage was to be first paid. In this state of the title, a sale upon execution would not have been an adequate remedy. This could only be afforded in equity, in a suit to which all the lienholders were parties, and where the various liens could be ascertained and marshaled, the property sold discharged of such liens, and the proceeds properly distributed."

What is said in reference to the state of facts in that case—the result of a sale on execution, and the propriety of marshaling liens, etc.—is applicable to the case at bar. Then he proceeds:

"Such is the character of this suit, instituted by the plaintiff as mortgagee to foreclose his mortgage, and to which the judgment creditors are parties; and its prosecution having resulted in a sale of the land, it has, in equity, performed the same office as respects the judgments, which would have been performed by sale on execution had that form of process been available and resorted to.

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“The object of the suit from its commencement, was to subject the land to sale for the benefit of the parties; and it would be exacting a vain thing of a judgment creditor to require him, pending the suit, to make an ineffectual attempt, by execution, to accomplish the object for which the suit was being prosecuted.”

And it is conceded by counsel for plaintiff here that it would be a vain thing to have execution issued; but still it is urged that a party insisting upon and attempting to preserve the lien of his judgment, should do something on his own behalf, should take some active measure, should at least file his cross-petition within the five years which would be an act done by him and which would have the same effect under the rule laid down in *Dempsey v. Bush* as having execution issue; that he should not action taken in his behalf, action which, it is urged, is in an action taken in his behalf, action which, it is urged, is in some degree adversary to him; that he should undertake to enforce his own claim, and that if he finds that an execution is impracticable, or would be idle and vain, if an action is begun to marshal liens upon the property, he should within the five years file his answer and cross-bill on his own behalf for relief. But Judge White says in this case, reading further:

“The action is a proceeding in equity to enforce the payment of the judgments and mortgages from the land; and in distributing the money resulting from its prosecution, it seems to us no good reason exists in equity why a judgment creditor, who was properly made a party while his judgment was alive, should lose his right to share in the distribution by the omission to issue execution, which, under the state of the title, could not have resulted in the sale of the land.

“The nature and object of the suit was the execution and enforcement of the liens of all the parties; and, when properly and successfully resorted to, it may well be held to supersede the necessity of other modes of execution.”

The court considers the action of marshaling the liens as an action on behalf of all parties interested in the land, superseding and obviating the necessity for an execution on behalf of any who are to be made parties to the suit—that it is in effect a sort of an equitable execution, taking possession of the property and

bringing it to sale for the benefit and in favor of all parties interested; and we think that this is a proper view of the matter, and that is the real kernel in this case. Although as a matter of fact in this case of *Dempsey v. Bush* a cross-petition was filed before the five years had expired, whereas in the case at bar it was not filed until after, we think the fact that the cross-petition was not filed herein until afterwards makes no difference. What the situation of the defendant, Robison, might be if the plaintiff had dismissed the action before Robison had filed his answer and cross-petition, we need not stop to inquire, because that case has not arisen. It might put him in a very embarrassing situation, but the plaintiff has not done that. The plaintiff is prosecuting his action, and Robison has a right to be heard in the action and to have his lien taken care of.

Entertaining these views, the demurrer to the cross-petition is overruled.

W. T. S. O'Hara, for plaintiffs.

Hamilton & Kirby, W. T. S. O'Hara, T. L. Gifford, for defendants.

NEGLIGENCE AS BETWEEN A FIRE DEPARTMENT TRUCK AND AN ELECTRIC CAR IN COLLISION.

[Circuit Court of Lucas County.]

THE TOLEDO RAILWAYS & LIGHT COMPANY V. ELIZABETH J. WARD, ADMINISTRATRIX OF THE ESTATE OF JOHN D. WARD, DECEASED.

Decided, October 31, 1903.

Negligence—At a Crossing of Streets—Electric Car Running Twenty-five Miles an Hour Collides with Ladder Truck—Captain of Truck Killed—Verdict of \$3,000 Sustained—Challenge of Jurors—Irregular Calling of Bystander by Order of the Judge—Judicial Discretion—Evidence of Custom in Slackening Speed of Cars at Crossings—Rules of Company Properly Put in Evidence—Fire Department Not Subject to Ordinance Limiting Speed of Driving Through the Streets.

- 1 A bystander was called by the clerk at the direction of the court to fill a jury panel, at a time when the regular jury were in the consideration of a case. After he had been examined, but before

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being sworn, the regular jury came into the room, and at the suggestion of counsel for plaintiff the bystander was asked to step aside, and one of the regular jury was called in his place. *Held:* That this could not be regarded as in effect a granting to the plaintiff of an additional challenge, but was within the discretion of the court, especially where the place of one called in an irregular way was filled by a member of the regularly impaneled jury.

2. Evidence of a custom of slackening the speed of electric cars in approaching a particular street crossing is admissible in a trial involving a collision at that crossing, as bearing upon the question of contributory negligence on the part of the one injured.
3. And, likewise, where the one injured is a fire captain, a rule of the street railway company, requiring that the right of way be given to an engine or truck of the fire department, is admissible in evidence, as is also a rule requiring all cars to slacken their speed at prominent crossings.
4. Cross-examination of a witness tending to show his feelings toward the parties to the suit is proper as reflecting upon his credibility.
5. A fire department is not subject to an ordinance prohibiting driving or riding upon the streets at a rate of more than six miles an hour.
6. It is not prejudicial in a charge to the jury, relating to the damages which may be recovered on account of the wrongful death of a husband or father, to use the word "bereaved" in the sense of "deprived."
7. An electric car traveling at the rate of twenty-five miles an hour collided, at a street crossing at 1 A. M., with a ladder truck, which was being driven at the rate of eight miles an hour. The captain of the truck, fifty-two years of age and earning \$900 a year, was killed, and a jury returned a verdict of \$3,000 in favor of his estate. He left a widow and grown-up children. *Held:* That in the absence of evidence the law will presume that the decedent supported his wife; that the question of his contributory negligence was a proper one for the jury; and that the verdict was not excessive.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought by defendant in error, who was plaintiff below, as administratrix, to recover for the death of John B. Ward, who was her husband. A verdict was returned in her favor for \$3,000. Judgment was entered upon that, and this proceeding in error was brought to reverse that judgment. Ward was a captain in the fire department of the city of Toledo, being a captain of a hook and ladder truck with three men under

him—two truckmen and a driver. About one o'clock in the morning of December 24, 1901, an alarm of fire was sounded in the western part of the city, at the corner of Nebraska avenue and Hawley street; the truck of which Ward was captain responded and left No. 7 engine house at a few minutes before one o'clock, and some few squares from Dorr street reached Collingwood avenue and turned into it, going toward the fire. At the intersection of Collingwood avenue and Dorr street the truck was struck by a street car of the defendant company, running westward on Dorr street. The truck was partially demolished and Captain Ward so injured that he died in a few hours, and this action was brought against the railway company to recover damages for his death, on the ground that it was caused by the negligence of the employes of the railway company who were running the car.

The case was tried to the court and jury and the first error complained of was in the selection of the jury. When the case was called for trial, the regular jury, or the most of them, were at that time engaged in the consideration of another case. The court began the impaneling of the jury, and in order to fill the panel directed the clerk, there not being enough regular jurors present, to call one M. Loenshal into the box, he being a bystander, and when he took his seat in the jury-box he was examined by counsel on both sides, and was interrogated as to his relations with the railway company and its employes and on other subjects, and the record recites that after this examination no challenge to him for cause was made, but that shortly after the examination the regular jurors, who had been deliberating upon another case, agreed upon a verdict and came into the court room and were discharged from that case. Thereupon Judge Commager, who was one of counsel for the plaintiff below, made this statement to the court: "I will ask Your Honor to call the regular jurors instead of talesmen, if we have a regular jury here." Thereupon the court directed Mr. Loenshal, who had been thus called into the box, to step aside, and to this action of the court the defendant railway company objected and excepted. Then the court directed the clerk to call the regular jurors, and Andrew Baker

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was called into the jury-box, presumably upon a call of the roll, as that would be the regular and proper way to call jurors. Then the plaintiff peremptorily challenged a juror, to which the defendant railway company objected and excepted, claiming that the court had no right after the juror, Loenshal, had been examined and no challenge for cause had been made, to direct him to step out of the jury box on the ground that the regular jury had come into the room, counsel for the defendant urging that he had become to all intents and purposes a regular juror and that they were entitled to have him remain in the jury-box; that the fact that the regular jury had come into the room did not affect the situation, and claimed that it was, in fact, giving to the plaintiff an additional peremptory challenge upon no ground stated in the statute. The record discloses that no challenge for cause was made to Loenshal, but after the regular jurors came into the court room the suggestion of Judge Commager was made to the court, as stated, and the court directed the clerk to call the regular jury.

In our judgment, there was no error in this proceeding of the court. Mr. Loenshal had not been sworn; he was not challenged "for cause," it is true, but he had been subjected to an examination by counsel for plaintiff, and in the course of that examination it is apparent that counsel concluded he would be an undesirable juror to sit in the case and that they did not desire to have him sit, and therefore suggested to the court that as regular jurors were present, one of them be called. There are three ways of challenging a juror under our statutes—he may be challenged peremptorily, he may be challenged for cause, and there is a challenge to the favor, which is a kind of a challenge for cause, under Section 5177, which provides:

"Any petit juror may be challenged also on suspicion of prejudice against, or partiality for, either party, or for want of a competent knowledge of the English language, or for any other cause that may render him at the time an unsuitable juror, and the validity of such challenge shall be determined by the court; and either party may peremptorily challenge two jurors."

It may have occurred to the court—we do not know—after hearing this examination of the juror and learning what was

elicited by that examination, that he was an unsuitable juror to sit in the case, and, upon reflection, the court may have concluded that in its discretion it would excuse him; that would be within the discretion of the court.

It may be remarked in passing that this juror was not called into the box in the regular way, as we read the statute. Where talesmen are called the statute makes it the duty of the sheriff to call them. If either party requests a special venire, the court may order it and give the names to the clerk, but the statute provides, Section 5173:

“But no person known to be in or about the court house shall be selected without the consent of both parties.”

Mr. Loenshal, at the time he was selected was in the court room. There is no provision of the statute, to our knowledge, authorizing the court to direct the clerk to call a man in this manner into the jury-box, though it may be done, of course, by consent; but unless a special venire is asked for, the statute makes it the duty of the sheriff, or his deputy (the court constable may also act for him), to fill the panel. So that there was an irregularity in the calling of this juror into the box. We do not speak of this in the way of criticism, there being no objection made upon that ground, but we speak of it as a fact in the case, it being claimed that the court erred in directing Loenshal to step aside. In the first place he was not regularly in the jury-box, and that may have occurred to the court. But, beyond all that, we are of the opinion and hold that the court had a perfect right to direct a bystander or talesman who had been called into the box, to step aside before being sworn if regular jurors came into the room, having been detained in the jury-room until that time. It is the business of the regular jurors to sit in the trial of cases; they are summoned for that purpose and their names having been drawn in the regular way out of the jury-box, if they are present, parties and counsel have the right to have their cases tried to the regular jurors who have been drawn and summoned. Talesmen and bystanders are called and special venires issued to fill vacancies which are occasioned by the absence or challenge of the regular

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jurors. It is not the policy of the law or the theory of these statutes that talesmen and bystanders shall sit on the jury when regular jurors are sitting idle in the court room. They are paid their per diem for performing this service, and their pay goes on usually whether they are actually sitting in a case or not, and it is in the interest of economy and good business policy for the court of common pleas to see that they are kept busy in the jury-box and not to call talesmen or bystanders when not needed. This man had not been sworn; he was not yet a juror, and whether he would sit or not was still within the discretion of the court.

A case in 63 Michigan was cited by counsel for plaintiff in error, but in that case a regular juror was excused by the court without any cause or reason, and the Supreme Court held that the judge had no right arbitrarily to direct a regular juror to step out of the box. That is not this case.

The truck was going at a rate of seven and a half to eight miles an hour along Collingwood avenue, an asphalt paved street; the car was going, according to the undisputed evidence in the case, from twenty-five to thirty miles an hour. It is claimed that Ward was guilty of contributory negligence in the manner in which this crossing was approached; that the horses were going at an excessive rate of speed and in violation of the ordinances of the city; it is claimed that the motorman of the car was ringing the bell so that it might have been heard if ordinary care had been exercised by Ward and the others upon the truck. One of the men on the truck, the driver who was driving the horses was not called as a witness, and a witness—Beck—was called and testified as to this driver's condition—to explain why he was not called as a witness. Beck's testimony upon that question was objected to, but was admitted and exception taken. He was permitted to state that he talked with the driver and the driver could not remember what had occurred; that he was injured about the head, and that the driver told him he could not remember. Without discussing this in detail, we are of the opinion that there was no error in admitting that. The testimony did not relate to any facts in the case, but it was proper to explain to the jury why this wit-

ness was not called and the explanation sought to be given was that, on account of his injuries, he had no recollection of the accident. Beck gave his opinion from seeing him and talking with him. That want of recollection may have been feigned by the driver, but it was a question to go to the jury. The driver might have been subpoenaed by the defendant and examined before the jury. In our judgment there was no error in admitting this testimony.

It is claimed that there was error in admitting the evidence of a custom of slacking the cars at this crossing. There was evidence offered and admitted tending to show that it was the custom in approaching this crossing for the cars to slacken their speed, and several witnesses testified to that, and the evidence showed that Ward had often crossed this crossing. He had been in the fire department for twenty-five years, and the presumption is that he had some knowledge of this custom, if it existed. Upon the question of contributory negligence and what he had a right to take into consideration at the time, we think it was proper to admit the evidence of such a custom, and it was for the jury to say whether that was a proper thing for him to consider and whether he probably knew of it.

Rules of the company were admitted over the objection and exception by defendant. A rule required the street cars to give the fire department the right of way at all crossings, and, if necessary, to stop and allow the truck or engine of the fire department to go by. We think that was properly admitted. The men on the truck had a right to take that into consideration as they approached this railroad crossing, and the violation of the rule would be evidence of negligence.

Another rule required the cars to slacken their speed at all prominent crossings. This was offered and admitted over the objection and exception and we think properly admitted.

On cross-examination, an employe of the railroad company, called by defendant, was asked by counsel for plaintiff if he had not been interviewed by counsel for plaintiff and refused to answer, stating that it was the rule to say nothing; and he was asked as to statements of his after the accident. This was objected to and exception taken. We think it was proper, on

cross-examination, to show the feeling of the witness towards the company and his feelings towards Ward as reflecting upon his credibility as a witness.

The defense offered to put in evidence the ordinances of the city prohibiting riding or driving on the streets of the city faster than six miles an hour. This was excluded by the court and that is claimed to have been error on the ground that the violation of a city ordinance is some evidence of negligence, and that it should have gone to the jury. The fire department is not subject to such an ordinance. It is the duty of the men in the fire department to get to a fire as quickly as possible after an alarm of fire is sounded; property and often human life are at stake, and an ordinance prohibiting firemen from going to a fire faster than six miles an hour would be unreasonable and would not be enforced by a court. It has been held by the Court of Appeals of New York and by the Supreme Court of Kansas that such ordinances do not apply to the fire department. The question is discussed in a case in *American Negligence Cases*, Vol. 1, p. 341 (152 N. Y., 222, *Farley v. The Mayor, etc.*) I read from the syllabus:

“Section 1932 of the consolidation act, regulating the speed of horses in the streets, has no application to fire engines on the way to fires.”

And this is discussed in the opinion along the lines that I have suggested. And again in the *American Negligence Cases*, Vol. 1, p. 67 (60 Kan., 481, *Kansas City v. McDonald*), the Supreme Court of Kansas, in the first paragraph of the syllabus, say:

“An ordinance making it a misdemeanor for any person intentionally to ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets of the city is unreasonable when sought to be applied to the fire department when driving to a fire, and for that reason will not be enforced.”

There was no error in the court's refusing to admit the ordinance.

The charge of the court is complained of. After an examination of the charge as a whole, we are of the opinion that there was no error in the instructions given to the jury by the court prejudicial to the defendant below; that the instructions upon

the question of concurrent negligence and subsequent negligence were fairly within the authorities. It is complained that the court used this language:

"It is purely a question of how much money will fairly compensate this wife and these children for what they have actually lost by reason of being deprived, or bereaved, if you please, of the support and maintenance which this husband would have rendered them."

Objection is made to the word "bereaved", on the ground that bereavement is not to be considered; but it is evident that the court used the word only with the meaning of "deprived" of the services, and the jury could not have been misled. There is no error in the rule for the measure of damages as given by the court, and the verdict of \$3,000 is not excessive. It is said there was no evidence offered to show that Captain Ward supported his wife. That would be the presumption. He was a man fifty-two years of age and had been in the fire department twenty-five years. He was tall and weighed nearly two hundred pounds; earning \$900 a year. He had a wife and three grown children who, although of age, are to be considered in some respects in the matter of damages, and we think \$3,000 was not an excessive verdict.

Nor do we think that the verdict was against the weight of the evidence. The proof is that the car was going twenty-five to thirty miles an hour; this is not denied by any witness. There were three or four men in the car, employees of the railway company, and none of them denied that the car was going at that rate of speed, and none, except the motorman in charge of the car, seemed to know how fast the car was going. Whether the bell was rung or the gong sounded is a disputed question. The truck was going seven or eight miles an hour. Whether Ward was guilty of contributory negligence, and whether the company was guilty of negligence, were fair questions to submit to the jury, and with their finding we have no complaint to make. The judgment will therefore be affirmed.

Smith & Baker, for plaintiff in error.

D. H. Commager, Harry S. Commager and Harvey Scribner, for defendant in error.

FIRE INSURANCE.

[Circuit Court of Ashtabula County.]

EUREKA FIRE & MARINE INSURANCE CO. v. WILLIAM GRAY.

Decided, January 31, 1902.

Proofs of Loss—Delay in Furnishing—Not Available to an Insurance Company, When—Arbitration—Total Loss—Partial Loss—Section 3643, Prescribing Determination as to, by Jury.

1. Where an insurance policy stipulates that proofs of loss must be forwarded within a reasonable time, but provides no penalty except that payment on the policy will be delayed until the proofs are furnished, the right to recover on the policy does not depend upon the time when the proofs are furnished.
2. The amount to be recovered on a fire policy in case of a total loss is a matter of public policy, and can not be waived; nor can it be arbitrated unless the loss is partial only. It follows, therefore, that where an award has been made, and an action is thereafter brought for a total loss, there can be no recovery unless a total loss is proven, and the only question for the jury is whether the loss is partial or total.

LAUBIE, J.; BURROWS, J., and COOK, J., concur

Heard on error.

The Eureka Fire & Marine Insurance Company v. W. Gray is a proceeding in error to reverse a judgment obtained by Gray upon a policy for the loss of a building, and in which the recovery was for a total destruction and the value of the building as mentioned in the policy.

Various defenses were set up, only one of which need be noticed, to-wit, an agreement to arbitrate and an award by the arbitrators.

Exceptions were taken to certain testimony offered upon the part of the plaintiff below in regard to the proofs of loss, and what had taken place at the time the agreement to arbitrate was signed, no part of which was prejudicial to the defendant, because the only issue as to the proofs of loss was as to time in which they were submitted to the company. There was no provision in this policy which made it void, or which provided that no action could be brought upon the policy if proofs of

loss were not submitted within a reasonable time. While it is stated in the policy that proofs of loss must be forwarded within a reasonable time, the only penalty for failure to do so is that payment of the loss will not be made until proofs of loss are furnished. They were forwarded in this instance some months after the fire, and even if they were not forwarded within a reasonable time, as the only penalty was that the loss should not be payable until they were furnished, all these exceptions in that behalf were immaterial, and the answers to the questions were not prejudicial to the defendant below.

As to the matter of the arbitration and award set up by the company, there was no denial by the plaintiff below, and, hence, on that account, unless there was a total loss, no recovery could be had, as the action was not upon the award. The Supreme Court of the state has held that the provision of Section 3643, Revised Statutes, in regard to the amount to be recovered in case of total loss, is a matter of public policy, and can not be waived by the parties; but that would not apply if it was but a partial loss.

Where there is a partial loss only, parties may agree to submit the question to arbitrators to determine the amount of the loss, as was done in this case; but where the loss is total the statute fixes the amount of recovery to be the value of the building as specified in the policy, and, although the parties may have submitted to arbitration the question of the amount of the loss, the assured can not be held to be bound by the award. This was recognized as the law by the court in its charge, and the jury were instructed that there could be no recovery in this case unless the evidence satisfied them that there was a total loss; and the court defined what a total loss was, and told the jury the amount that they must render judgment for in case they found there was such total loss. So, under the instructions which the court gave to them, the jury found that there was a total loss, and the evidence discloses conclusively that the loss was total. The evidence on this point submitted to the jury showed that even the walls that were left would be of no particular value in rebuilding. So far as the charge of the court is concerned, the court gave substantially the request

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of the defendant below, and gave instructions that were prejudicial to the plaintiff and in favor of the defendant upon the question of the proofs of loss. No such charge ought to have been given. The only question which should have been submitted to the jury was whether the plaintiff had proved a total loss or not.

The judgment of the court below will be affirmed.

EXPENSES OF AN INDEPENDENT MILITARY COMPANY.

[Circuit Court of Cuyahoga County.]

PETER WITT, ON BEHALF OF CLEVELAND, v. J. P. MADIGAN, DIRECTOR OF ACCOUNTS.

Decided, June 16, 1902.

Independent Military Companies—Organized under Section 3056—A Part of the State Militia—State not Relieved from Armory Expenses—And Payment of Janitors by a Municipality is Unauthorized.

Janitors in charge of an armory, used by an independent military company, organized under Section 3056, and thus a part of the active militia of the state, must look to the state for payment for their services, and a municipal ordinance providing for their payment is invalid.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Appeal by defendants.

This case involves Section 3056, Subd. 1, 2, 3, 4, 5 and 6, Revised Statutes, and is brought to enjoin the city of Cleveland from paying janitors for the care of armories occupied and used by certain military companies, which janitors are employed by and under the control of the company employing.

The main question in the case is, are the Cleveland City Guards a part of the militia of the state? If they are, then all expense connected with such guards must be paid by the state. On the other hand, if the Cleveland City Guards are not a part of the militia of the state, but an organization purely local, then it is claimed that the law is constitutional and can be enforced.

And if this latter view is correct the petition should be dismissed, otherwise the injunction should be made perpetual.

This section purports to give the citizens of Cleveland authority to organize, arm and equip an independent infantry company consisting of not less than fifty nor more than one hundred active members, to be known as the Cleveland City Guards, and requires the members to sign an agreement to be subject to all calls of the mayor, or of the governor of the state, in case of insurrection or riot or when there is reasonable apprehension thereof, which written agreement shall be deposited with the mayor of such city.

Subdivision 1, Section 3056, Revised Statutes, gives the governor substantially the same control and authority over these companies that the law does over the militia of the state.

Subdivision 2 provides for contributing members, and the amount, or minimum of the amount, that each contributing member must pay. This same provision exists in regard to the militia of the state under the general provision.

Subdivision 3 provides how the members are to be governed, and the general provision is, that "The active and contributing members of such company shall be entitled to all the privileges and exemptions allowed members of the Ohio National Guard." And then provides the same penalties for refusing to respond to a call of the mayor or governor, as is provided in case of such refusal on the part of the National Guard; and provides the minimum number of men that shall be at all times in the company. It then provides that the company shall have no pay from the state for camp duty, transportation, "or for any other purpose." This "or for any other purpose" should be, under a well known rule of construction, confined to "for like expenses" to that of camp duty and transportation, and can not be construed to apply to allowance for expenses when called out by the governor of the state.

Subdivision 4 provides for calling them out in case of riot or disturbance, by either the mayor or the governor, and, when so called, they shall be subject to the orders of such mayor or governor.

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Subdivision 5 provides for existing independent companies organized and bringing themselves under this act.

Subdivision 5a provides for the city paying for janitors for the care of the armory occupied by, and used by, such companies for military purposes; the janitor to be employed by, and to be under the control of the company.

It is our judgment that these companies, formed under the above provisions of law, are so far a part of the Ohio National Guard, and are to such an extent active militia under the laws of the state that provision for their expenses, such as are involved in this case, are to be borne by the state, and not by the county or the city.

There are the same provisions in regard to organization, in regard to the duties to be performed, as to whose orders they shall be subject, as to contributing members, as to privileges, penalties and records, as to the number of members composing the companies, as in regard to the Ohio National Guard.

There are a number of cases cited on the hearing in this case, that these companies, being a part of the National Guard, must be maintained in any degree by taxation, by tax levied on *all* the property of the state, and a statute authorizing a local tax for such purpose, or providing for their pay, or expenses pertaining to their organization, out of the treasury of the state, without any provision for repayment from the state of such expense, is unconstitutional. The case of *Hubbard v. Fitzsimmons*, 57 Ohio St., 436, 447, 449; *State v. Kreighbaum*, 9 C. C., 619, and various other cases cited. Also *Presser v. Illinois*, 116 U. S., 252.

It is unnecessary in this connection to discuss the question of when the militia of a state passes from under the control of the state to that of the national government, as it would lead to no definite conclusion of the real questions involved in this action. The general rule, as established by the authorities, is well stated in the last case above referred to, and it is evident that these companies under consideration, if not private companies of the state, are a part of the militia of the state; and, having found that they are a part of the militia of the state, it follows from the various decisions in this state, that the expense of maintaining them and providing quarters for them and caring for those

quarters is a part of the state expense that must be raised by a state tax.

Our conclusion is that the ordinance in question is unauthorized and invalid, and the injunction against the payment of the expenses of the janitors under the ordinance is made perpetual.

Samuel Doerfler, for plaintiff.

Beacom, Baker, Payer, Gage & Carey, for defendants.

CONSIDERATION FOR CONVEYANCE FROM FATHER TO SON.

[Circuit Court of Morrow County.]

EMMA KIME V. JOHN ADDLESPERGER ET AL.

Decided, June Term, 1903.

Deed—In the Nature of a Testamentary Act—Consideration for Executing—When Made to a Son—Support for Life of Grantor and His Daughter and Payment of His Debts Sufficient—Necessary Capacity to Execute Such a Deed—If Attacked, Burden of Proof Is Upon the Plaintiff.

1. A deed executed by a father to his son, under an agreement that the son is to care and provide for his father and furnish all that his condition requires, and furnish a home and the necessities of life to his daughter so long as she lives, and also pay the father's debts, is for a valuable consideration.
2. The proper test of mental capacity on the part of one executing such a deed is his relations to those who are the natural objects of his bounty, and his capacity to understand to a reasonable degree the condition of his property and the nature and effect of what he is doing.
3. The fact that one of the parties to such a conveyance was well along in years, and the father of and living with the grantee, does not put upon the grantee the burden of showing affirmatively that there was no undue influence exerted or fraud practiced, but the ordinary rule prevails that fraud and undue influence must be proven by the one alleging them.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

This action comes into this court on appeal; and the object of the plaintiff's suit is to set aside a deed that was made by one William Addlesperger to his son, the defendant, in 1898.

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The grounds on which it is sought to set aside the deed are:

First. That the grantor, at the time the deed was made, in December, 1898, was not of sound mind, or had not mental capacity sufficient to make a contract.

Second. That by reason of his age, infirmity of body and mind, he was easily influenced, and the defendant taking advantage of his physical and mental condition, induced him to make the deed to him without consideration, and as a fraud upon the grantor and those who were the proper objects of his bounty.

The contention of the plaintiff is that by making this deed the old gentleman had deprived himself of his property, and the son who received it (they living together in the same family) exercised such influence over his father that it was undue influence and fraud, and undue influence would be presumed from the relation they sustained to each other. And to more concisely state the issue, the plaintiff claims the grantor, at the time the deed was made, was not of sufficient mind to make a contract, and that the deed and contract were not his free act but was the result of undue influence exercised over him by his son, who was the grantee named in the deed.

The defendant denies that his father was not of sound mind and memory, but on the contrary that he was at the time the deed was made able to and did comprehend the business in which he was engaged; that it was his free act and deed, voluntarily entered into, and the grantor, by making this arrangement, secured to himself what would be an adequate and fair consideration of the premises conveyed.

Taking up the case in this order: The first inquiry is, was the old gentleman, at the time this deed was made, capable mentally to make a contract? A good deal of evidence has been introduced by the respective parties bearing upon this issue. In addition to the testimony that has been introduced it is necessary to look at the circumstances surrounding the parties at the time the deed was made, for the reason that the circumstances and the purpose for which the contract was entered into throw light upon the transaction as to whether it is reasonable or otherwise; and the situation of the parties at the time

the contract was executed is important and bear upon the question involved as to mental capacity.

Briefly referring to the situation of these parties: Some years before this transaction occurred the old gentleman's wife had died, leaving him alone, excepting a daughter who was, it seems from the proof, while physically well and able to take care of herself, mentally she is not up to the average; and therefore the father was concerned as to her welfare, and had reason to provide for her future in any disposition that he might make of his property. After his wife died, the plaintiff, who had been married perhaps about a year, went with her husband to live in the home of her father; they lived there some twelve years during which time the plaintiff's husband managed and had charge of the farm upon which the old gentleman lived, and which is the same property that is here in controversy. During the series of years that the plaintiff and her husband lived with the old gentleman there were changes made in the arrangements and contract as to the occupancy of the premises; the last change that was made, it was agreed that Mr. Kime was to pay the old gentleman fifty dollars a year as rent. In the year 1898, by reason of the failing health of Mrs. Kime, the plaintiff, they were unable to longer continue to live under the arrangement that had been made theretofore, and she became unable to longer take care of her father and render him the assistance necessary for his comfort.

It does not appear from the evidence that there was any trouble between the father and daughter, but by reason of her physical inability to longer discharge the duties they had assumed, they voluntarily left the place.

The old gentleman was unwilling, or at least did not wish that his daughter should leave, but desired they should remain on the place and discharge the duties they had assumed. When they were about to leave, and before they did so, the old gentleman and Mr. Kime went to the defendant, a brother of plaintiff who was living at that time some fourteen miles away from where the old gentleman resided, and their mission was to see if he would move upon the farm and take charge of his father and farm the place. If such arrangements could not be effected

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with the son, the defendant, the old gentleman had in mind and intended to select some stranger to live with him and manage the farm. But when his wishes were made known to the defendant he promptly and willingly said he would move on the farm, live with his father and take care of him, all of which he did.

To this time, and up to this point in the history of the case, there is no evidence that the defendant ever sought this position. It was not a position that he was seeking; he had no object or purpose in moving on the place whereby he could secure influence over his father, but when he found his sister and brother-in-law were about to leave he was willing to go and assume the obligations of looking after the wants of his father and manage the farm rather than have a stranger do so.

Soon after the defendant had moved with his family on the farm the old gentleman called his attention to the condition of the farm; that it needed repairs and there would have to be some expenditure of money on the farm in order that it be useful and serve the purpose for which he desired, namely, to secure for himself a comfortable home, care and support.

The old gentleman wanted defendant to make needed repairs; the defendant informed him that he would not, as he didn't desire to put his money into the farm unless it was secured in some way. The old gentleman then proposed he would make him a deed, provided the defendant would enter into a contract with him agreeing to take care of his father, furnish him the necessaries of life, and all that his condition required; and furnish a home and the necessaries of life for his daughter, Mary Ellen, who was living with her father, and pay all the debts then owing by the old gentleman.

The proposal made was accepted by defendant, and in consideration thereof the deed in question was executed and delivered, and the defendant executed a writing which is equivalent to a life estate in this property in favor of the father as long as he lived, and also in favor of the daughter, Mary Ellen, as long as she lives.

Some discussion occurred between the father and the son as to who should do this business or get up the necessary papers.

The old gentleman selected a friend, an acquaintance that he had, who lived some distance from his home; but at the time the papers were to be executed the weather was unfavorable, and a suggestion was made by the defendant that another friend and acquaintance of his father, who lived more convenient than the first, might be secured if satisfactory to his father. The other person suggested was a justice of the peace by the name of Van Buskirk, who was accordingly selected. He was sent for, the defendant going for him; a circumstance that may be considered in cases of this character, where a beneficiary of a conveyance is instrumental or an active agent in bringing it about, is a circumstance that may be properly noticed in connection with the whole transaction. Mr. Van Buskirk, the justice of the peace, went to the old gentleman's home, prepared a deed and lease; and they are executed before him as such officer. There is a circumstance that occurred between the officer and the old gentleman I will call particular notice to as bearing upon the two questions: First, as to capacity of the old gentleman, and also upon the question of undue influence, or free agency of the old gentleman in making the deed.

After the papers were prepared the old gentleman had a private conversation with Mr. Van Buskirk, which shows what was in his mind at that time. After he had executed the deed he said to the justice that he was not certain that he had done just right by Emma, his daughter, but expressed no desire to change what he had done.

This is briefly the history of the transaction that preceded and immediately followed the making of the deed. The question is whether or not, at the time the deed was made, had the old gentleman capacity to comprehend his situation and the business in which he was engaged. It would seem from the circumstances referred to that he unquestionably had in mind the objects of his bounty.

He also had in mind and contemplated the effect that the deed and lease would have upon himself, as well as the objects of his bounty, and he knew the condition of his property; and the testimony shows he secured for himself care and attention during the remainder of his life, the contract, or life lease to

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himself, and the support of his daughter, Mary, and he had also in mind his other daughter, Emma, the plaintiff, when he said he did not know whether he had done just right by her.

These are circumstances and elements tending to show capacity to make a will; and while we can not take any one case and say it furnishes a distinct and clear rule, as each case must largely depend upon its own surroundings and circumstances, yet there are some general principles that apply and are applicable to all cases of this character, and among them is the rule that the degree of mental capacity to make a contract or will is that one who is capable of comprehending the condition of his property, and his relations to those who are the natural objects of his bounty, and is able to collect and retain in mind, without prompting, the elements of his business, possesses capacity to make a testamentary disposition of his property.

It is not expected that men, when they become advanced in years, retain the same mental powers that they possessed when young; that can not be expected, and the law does not contemplate such conditions; if that were required it would be impossible for a large proportion of men to dispose of their property in the latter part of their lives when such dispositions are usually made. A person's memory may be impaired, his body weak and feeble; he may not be able to labor, or do business as when young; he may ask foolish questions, repeat questions and conversations, and, in the language of some of the books, he may not be always able to recognize his neighbors and friends; yet that does not determine whether he has capacity to transact ordinary business, or such business as we have here under consideration. And we further recognize the rule, that to make a contract requires more ability than to make a will, for the reason, in a contract there are two parties and their interests are antagonistic; hence the rule is that it requires more capacity to make a contract than a will. Yet there is another principle not to be overlooked, and that is that a deed often is, in a sense, testamentary in its nature, and when such is the case the act is to be tested by the degree of capacity required to make a will. We think in this case the deed is of a testamentary nature.

The old gentleman, at the time he made this deed, had reached a point in life that it was necessary for him to make some disposition or change as to his property; that is, his property must furnish him support, and he needed some one to take charge and care for him, and his property must be the means for furnishing support, care and attention. The favored daughter, the plaintiff, was the one no doubt he desired should live with him during the remainder of his life, but she was unable to discharge that duty and left him alone, and he had to look elsewhere for some one who was able and willing to discharge that duty.

Coming more directly to the question of his mental capacity, and believing the rule does not require that high degree of capacity that a man's memory must be just as perfect as it ever was, or that his physical ability as good as it was in former years, but that he may be enfeebled in mind and body so that he will not be able to fully, at all times, comprehend his situation or surroundings, and at times forget his neighbors and friends, those with whom he was well acquainted in former years, nevertheless when it comes to a question of capacity to dispose of his property, a subject upon which he may have reflected much when in full vigor of mind and body, these failures of memory and infirmities of age are not sufficient to overcome the principle that he has a right to dispose of his property, if he is competent and able to comprehend his situation, the purposes and objects of the business in which he is engaged and recognizes and knows the objects of his bounty, and the condition of his property.

If this is a correct test of capacity we think there is no evidence whatever in this case to show that this old gentleman, when this deed was made, had reached a condition of mental weakness that incapacitated him from making the disposition of his property that he did make to his son, the defendant.

Second. Was there undue influence? As a general rule fraud and undue influence must be proved by him who alleges them, but they may, in certain cases, be inferred from circumstances, as in the execution of a deed where the grantor was partially incapacitated by mental infirmity, or was subject to

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the controlling influence of the grantee, if it appears that the deed was without valuable consideration, or that the grantee acquired an undue advantage by its execution. Under such circumstances the burden is upon the grantee to show affirmatively that the grantor clearly understood the nature and effect of the transaction, and voluntarily executed the instrument.

The evidence in this case fails to show any of these conditions or circumstances, unless it be that the grantor, William Addlesperger, at the time he had made the deed in question, was mentally and physically infirm; and from the relation between the grantor and grantee, that of father and son, the burden is cast upon the defendant, the grantee, to show that the grantor clearly understood the nature and effect of the transaction, and that he voluntarily executed the deed.

Whenever the relation between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled, but there is often great difficulty in applying it to particular cases.

The law presumes in the case of guardian and ward, trustee and *cestui que trust*, attorney and client, and perhaps physician and patient, from the relation of the parties itself, that their situation is unequal and of the character defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings. But while the doctrine is without doubt to be extended in many other relations of trust, confidence or inequality, the trust and confidence or the superiority on one side and weakness on the other, must be proved in each of these cases; the law does not presume them from the fact that one party is father and old,

and the other a son and young. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from the relationship shown in this case.

It can not be said that from the fact the defendant lived on the farm with his father under the contract of life lease and cared for him, paid his debts, furnished support for the daughter, Mary Ellen, as provided for in the lease, or at the time the defendant went to live with his father, that the father needed some one to take charge of his farm, and care and provide for himself and his said daughter, or that at the time he was old, forgetful, and in conversations would dwell on events of his early life and did not engage actively in any business, and, on the other hand, the defendant, his son, lived in the same house, going there at the solicitation of his father and the son-in-law, Kime, taken separately or together raise a conclusive presumption of law that their situation was unequal and fiduciary. These relations, as matter of fact, may have led to or been consistent with controlling influence on the part of his son or weakness and confidence on the part of the father, but this was to be shown, and is not necessarily presumed from the relations themselves, as in the case of trustee, guardian or attorney.

There is not a particle of evidence that the old gentleman, after this deed was made, ever complained about it, or that the defendant did not faithfully perform the contract on his part. There was no secrecy about the execution of the deed; it was placed on record without delay; no effort to conceal the transaction from the plaintiff or any one interested in the grantor or his estate.

We find as a fact that there was no undue influence used by was the free and voluntary act of the grantor. It was contended that there was not a sufficient consideration for the land conveyed, and, therefore, the deed is fraudulent and should be set aside. The fact that the deed was made to the son of the grantor is a circumstance to be considered in connection with the sufficiency of the consideration. If the old gentleman had mental capacity sufficient to transact ordinary business, and was free

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from restraint and undue influence, he had a right to make such disposition of his property as he thought proper:

A father has a right to dispose of his estate in any way he may deem best. He is not required to make an equitable distribution of his estate, among even the objects of his bounty. He may, if he choose, exclude his children, or divide his estate among them unequally. The question in all cases is, was the act the free act of a competent party?

On the other hand, while a son or daughter has no legal demand upon the parent as to how he will distribute his property, yet courts of equity will not vacate a deed obtained by means of influence or importunity unless it has been unduly or improperly exercised. Fair argument and persuasion, or appeal to the conscience or sense of duty of the grantor, especially by those having claims upon his justice or his bounty, if fairly made, lay no foundation for vacating a deed, although the grantor would not have executed it but for such appeal, argument or persuasion. *Truman v. Lore*, 14 Ohio St., 144-156.

The defendant in the case at bar assumed to pay the debts of his father, the amount of which was uncertain; he was to furnish his father with support, care and attention as long as he lived, and a home and maintenance for his sister Mary so long as she lives. The extent of any one or all of these assumed burdens on the part of defendant was uncertain; he was to furnish his father with support, care and attention as long as he lived, and a home and maintenance for his sister Mary so long as she lives. The extent of any one or all of these assumed burdens on the part of defendant was uncertain, and will continue so long as Mary lives, yet the defendant assumed them and secured the faithful performance thereof, by executing an instrument in writing, called a life lease, to his father and sister, which are a lien upon the farm as much so as if he had executed a mortgage. There is no pretense or claim made by plaintiff that defendant has not faithfully carried out his part of the contract so far as the father was concerned, and the sister, although a party to this action, makes no complaint that he is not doing the same so far as she is concerned.

We think under these circumstances there is not such want of consideration as to be evidence of or raise any presumption of undue influence against the defendant.

This case is clearly distinguishable from the cases cited by counsel for plaintiff, not only as to the facts, but as to the application of the law to the facts.

In the case of *Tracey v. Sacket*, 1 Ohio St., 54 (59 Am. Dec., 610), the grantee was a stranger to the grantor. He failed ignominiously in carrying out the contract he had entered into with the grantor.

In the case of *Allore v. Jewell*, 94 U. S., 506, the grantee was a stranger to the grantor. The grantor was an old lady of great mental weakness and the consideration was grossly inadequate.

The case of *Corbit v. Corbit*, 4 Bull., 1006. The facts in that case are so materially different from the facts in the case at bar it can hardly be considered an authority in this case. The principles of law there announced are correct, and when the facts warrant, their application should be controlling.

We have gone over the main features of this case; and it will be observed we have confined ourselves largely to circumstances, rather than a repetition of the testimony of witnesses, in which there is much conflict. Lawyers know that in cases of this character and upon such issues, conflict in the evidence is naturally expected. Witnesses, non-experts, come in and give their opinions, and it is pretty difficult to arrive at a conclusion that will harmonize with all the evidence: the transaction itself and the circumstances must furnish the rule for the solution of the question. Courts are not expected to make wills or contracts for parties if they have capacity to make them and are free from undue influence.

When the plaintiff's father recalled to his mind the fact whether he had done just what he ought to have done for her, he did not see proper to change his arrangements, therefore the court can not change it for him. The decree will be for the defendant; the plaintiff's petition dismissed.

F. O. Levering and *W. D. Matthews*, for plaintiff.

L. K. Powell and *J. W. Barry*, for defendant.

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CONTRACTS FOR PUBLIC WORK.

[Circuit Court of Franklin County.]

THE STATE OF OHIO, EX REL EDWARD L. TAYLOR, JR., PROSECUTING ATTORNEY, FRANKLIN COUNTY, OHIO, v. NATHAN B. ABBOT ET AL, TRUSTEES, ET AL.

Decided, February, 1904.

Public Contracts—Work Must be Awarded Under the Plans and Specifications Advertised—With Equal Opportunity to All Bidders—Test as to What Specifications Mean—Is the Manner in Which They were Understood by Bidders—Laches—On Part of the State in Questioning Validity of Contract—Injunction.

1. A contract for the construction of a public building is illegal and void, where the plans and specifications upon which it was awarded were not those which the board caused to be prepared and advertised, were not responsive to the invitation to bid, and did not give other bidders the same opportunity to bid that was enjoyed by the contractor to whom the work was awarded.
2. The test to be applied in determining the meaning of plans and specifications in connection with public bidding is the meaning derived therefrom by bidders and contractors familiar with the language employed.
3. Authority to invite alternate bids would not authorize the acceptance of any alternative bid, submitted on condition that if certain parts of the building are omitted, or other changes made, not provided for in the specifications upon which the building was invited, the bidder will construct the building for the sum stated in his bid.
4. The state is without the facilities for the discovery of fraud or irregularities in matters of public work which are open to individuals with reference to their own affairs, and a court of equity, applying the rule of laches according to its own ideas of right and justice, will recognize this fact where a claim of laches is made against the state.

SULLIVAN, J.; SUMMERS, J., and WILSON, J., concur.

Heard on appeal.

This action is brought to perpetually enjoin the trustees above named, as trustees of the memorial association of Franklin county, Ohio, from carrying out or completing a contract entered into by them as such trustees on the 7th of November,

1903, with their co-defendant, W. H. Ellis & Company, a firm doing business as general contractors under that name; also to perpetually enjoin said firm, their agents, employes, sub-contractors, etc., from carrying out or completing said contract, or doing any act or thing toward the completion of the same, and that the auditor of the county be enjoined from issuing any vouchers to said Ellis & Co., upon said contract, and that the treasurer of the county be enjoined from paying out any money out of the funds in his hands to said Ellis & Co. under said contract.

It is claimed by the plaintiff through its representative, the prosecuting attorney of Franklin county, that the contract entered into as above stated and which it assails, is an illegal and void contract and in contravention of the laws of Ohio, because it is a contract for the construction of a memorial building under an act of the Legislature passed March 12, 1902 (Vol. of Laws 95, pages 41, 42, 43, 44), entitled an act "To provide for the construction and maintenance of a county memorial building to commemorate the services of the soldiers, sailors, marines and pioneers of the several counties of the state," and said contract is not based upon any detailed plan, specifications, forms of bids, and estimates of cost theretofore adopted by *said trustees*. By Section 6 of said act the board of trustees are authorized to employ architects, and Section 8 gives the board power to prepare, or cause to be prepared, plans and specifications, and to make contracts for the construction of a memorial building for the purposes specified in the act within the amount authorized. In making the contract authorized by this section the board are to be governed by the provisions of the several paragraphs that follow and contained in Section 8. The first paragraph provides, "That said contract shall be based upon detailed plans, specifications, forms of bids, and estimates of costs, to be adopted by said board," and the third paragraph provides, "that no contract shall be let except to the lowest and best bidder, who shall give a preliminary and a final bond conditioned that he will enter into the contract. And paragraph second of said section, that the contract shall be made in writing upon a concurrence of a majority of the board, signed by the

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president and secretary of the board and the contractor, after an advertisement in two newspapers published and of general circulation in the county for a period of thirty days."

The plaintiff avers that said board employed Frank Packard as an architect to prepare detailed plans, specifications, estimates of costs, which was done by said architect, and upon the completion of the same the board caused to be advertised in two newspapers and of general circulation in said county for a period of thirty days that it would receive sealed proposals up until 12 o'clock noon, October 31, 1903, for performing the labor, furnishing the material to erect said building according to the plans, descriptions, bills and specifications, prepared by Packard, the architect, to be found on file at the office of the association, Room 1210, New Hayden Block in the city of Columbus, where the same would be open to public inspection between the hours of 8 A. M., and 5 P. M., on all working days during the said period of thirty days. The plans, specifications, etc., prepared by Packard, the architect, and upon which sealed proposals were invited by the above advertisement, contained the following, under the head of supplemental bids and designated as proposition No. 2: "Supplemental bids will also be entertained for constructing the entire building, including all exterior walls, inside partitions, floor construction, girders, columns of Ferro concrete construction or other re-enforced concrete construction. Bids for this class of work, however, must be accompanied by complete specifications and data relative to the methods of constructions, the composition of the concrete, and the method of re-enforcing the same. It is understood that in making a bid for this method of construction, that the inside finish, the general layout of the building, and in fact all work excepting partition walls, floor construction, girders, and columns, are to be the same as described in the within specifications."

The defendant, Ellis & Co., submitted a bid under this proposition, together with specifications in which they offered to furnish all the material and construct the entire building, walks, driveways, etc., for the sum of \$211,305, and in the first paragraph of the specification attached to their bid stated that the

same contained certain changes which were necessary in the various branches of the work to enable the said firm to perform the work for the sum stated, whereupon Packard, the architect, prepared supplemental specifications, which in many particulars were based upon the provisions contained in those of Ellis & Co., in which there appears many material changes and omissions of matters contained in the original plans and specifications upon which sealed proposals were invited.

The claim of the contractor, Ellis & Co., is that the omissions and changes contained in the supplemental specifications were necessary to the change from standard to concrete construction, and made for the purpose of economy, the board being fully authorized to do so by law and under the detailed specifications prepared by them, and therefore the bid was responsive to the invitation, and being a lawful and the lowest and best bid, contract is not illegal and void.

The claim made by the trustees in their answer is substantially the same as made by Ellis & Company.

The changes required by said Ellis & Company, to construct the building, walks, driveways, etc., for the price named consisted of several omissions of parts of the buildings set forth in the original specifications, whilst others consisted in changes in form of constructions, decoration and material—all were to be made, however, for the purpose of enabling Ellis & Company to construct the building, driveways, etc., for the price named in their bid.

The estimated cost alone of the omissions based upon the statement of Ellis & Company amount to several thousand dollars, the largest item being the sixteen columns, \$10,000; ventilating fan, \$6,000; and the change from a Scotch marine to the tubular boiler, \$2,500. There are other changes and omissions, the items of which are small, but in the aggregate amount to at least \$2,000. The difference in change of material and in inside finish from cabinet to first-class carpentry and joiner's work, under the testimony produced by plaintiff, would be large, and as it is stated in the first paragraph of the specifications submitted by Ellis & Company with their bid, that the changes suggested were necessary to enable them to construct the

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building, driveways, etc., for the sum stated; and it must necessarily follow that all changes, except those necessary to construct the building of Ferro concrete, were made because the material proposed and change in finish in place of those set forth in the original specifications cost less money.

The specifications submitted by Ellis & Company as to these changes and omissions were adopted by the board, and the contract assailed by plaintiff entered into immediately upon their adoption.

Under the provisions of the original plans and specifications inviting bids for Ferro concrete construction, we think it clear that persons submitting bids under it were not authorized to include in the specifications required to accompany the bid any omissions or changes from the original plans and specifications, except such as were necessary to that method of construction. The invitation to bid under proposition No. 2 of supplemental bids explicitly states that such bids will be entertained for constructing the entire building including all exterior walls, inside partitions, floor construction, girders, columns, etc., of Ferro concrete construction. The columns are not to be omitted, but instead of being constructed out of the material provided in the original specifications concrete may be used.

The entire proposition should be construed together, so that the exception found in the second paragraph of the proposition relates simply to the material that was to be used in the construction of the inside partitions, floors, girders, columns, etc. The inside finish could not be changed, except perhaps where a change to Ferro concrete construction required it. But the inside finish, general lay-out of the building, was to be the same as provided in the original plans and specifications. Upon the claim of the defendant, that under the exception contained in proposition No. 2 the omissions, changes in material and finish named in the specifications furnished by Ellis & Company could be made and in that respect adopted by the board, plaintiff called several witnesses who follow the business of contracting for the construction of buildings of this character, and whose testimony showed they had had large experience, several of whom inspected the original plans and specifications with a view

of submitting bids, and this testimony was uniform, that in the exception the omissions provided for in the supplemental specifications were not included and not necessary in the adoption of the Ferro concrete construction. They submitted no bid upon either method of construction, for the reason that having personal knowledge as to the amount of funds the trustees had on hand to expend for the purpose, they knew the building, by either method, could not be constructed for that amount upon the plans and specifications upon which they were invited to bid. It is not what the trustees or the architect may have understood proposition No. 2 including the exception to mean, but how it was understood by contractors familiar with the language employed. *Pease v. Ryan*, 7 C. C. R., p. 50.

In the proposition no reference is made to the exhaust fan or any change from a Scotch marine to the tubular boiler, though they constitute large items in the omissions, and the testimony shows that concrete construction would not require the omission of either.

It is true that it is shown that the tubular boiler will perhaps answer the purpose intended fully as well as the Scotch marine, but there is no provisions in the original specifications that a bid might be made for a tubular boiler.

There are other changes and omissions, but a sufficient number and cost of same have been mentioned to sustain the conclusion reached and hereinafter stated. Whether these omissions or changes were such as did change any essential part of the building, or if constructed as provided by the supplemental specifications, there would be. in all the essential parts, substantially the same kind of a building as provided for by the original specifications, we think not material. The question is were the specifications upon which bids were invited in such form and expressed in such words as those to whom the invitation was extended could understand, that each bidder submitting a bid under proposition No. 2 could in the specifications accompanying his bid require the changes and omissions set forth in the bid of Ellis & Co., or that any such changes and omissions were permissible.

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In view of proposition No. 2, as stated, and the testimony produced by plaintiff already referred to, we are of the opinion they were not permissible, and therefore the specifications upon which the contract with Ellis & Company was made were not those upon which competitive bids were asked.

The authority of the trustees to invite alternative bids being conceded, does the statute, by which all the authority they have is conferred, authorize them to accept any alternative bid, submitted on conditions that if they will omit certain parts from the building, and changes in finish, etc., that were not contemplated or intended, nor provided for anywhere in the specifications upon which competitive bidding was invited, that the bidder will construct the building, etc., for the sum stated in his bid? If so, then the trustees are authorized to enter into a contract without any reference to the plans and specifications upon which sealed proposals have been made, and the bidder who could succeed in getting in the greatest number of omissions and changes would be the successful one if the changes and omissions made his bid the lowest.

If plans and specifications are to be adopted by the board after all bids are in, then paragraph 3 of Section 8 is of no force. Section 6 authorized the board to employ an architect, and as contracts for construction can only be based upon detailed plans and specifications, forms of bids and estimates of costs, it is apparent for what purpose his employment is authorized. And as the contract for construction can be based alone upon detailed plans and specifications, and as provided by paragraph 3 of Section 8 that no contract shall be let except to the lowest bidder who shall give bond, etc., it is clear we think that the Legislature intended to and did provide the same safeguards to be found in other statutes pertaining to like matters, with the view to secure the benefit and advantage of fair and just competition between bidders, and at the same time close every avenue to favoritism and fraud and to insure the accomplishment of the work at the lowest price by subjecting the contract for it to public competition.

There is no fraud or bad faith charged in this case, and the evidence clearly shows that the trustees as well as the contractor

have proceeded in good faith and with no intentional wrongdoing, but it also shows that the contract entered into with Ellis & Co. is clearly in contravention of the statute under which they were acting, and therefore void.

The contractor and the trustees could reasonably be expected to be governed by the understanding the architect might have as to any provision of the specifications prepared by him, but this would not avail either, if such understanding was different from that of contractors invited to bid familiar with the language employed.

It is claimed further by the contractor, and also by the trustees, that the delay upon the part of the prosecuting attorney in bringing the action was unexcusable; that as a result of such unexcusable delay the contractor had incurred large expenses in the necessary preparation for the prosecution of the work, by moving to the site of the building at a large expense the apparatus to be used, bringing material upon the ground, entering into contracts for material to a large extent, the execution of the bond required and procuring the required sureties thereon, so that if the prayer of plaintiff's petition should be granted the contractor would sustain serious loss; that being in a court of equity, notwithstanding the fact that the contract was illegal and void, yet in view of the foregoing, the court, looking to the equities of the parties, should "remain passive and do nothing in the premises."

A court of equity applies the rule of laches according to its own ideas of right and justice.

The state has necessarily to depend upon its representatives and agents in matters of a public nature, and when the interests of the public are materially injured, by illegal proceedings, whether by fraud or otherwise, it can not have the facilities of discovery where simply individuals are interested and affected, and courts of equity have recognized this fact in the doctrine of laches.

If during the period necessary to enable the state through its representatives to prepare its action, to avoid and prevent a wrong to the public and protect it against loss, a contractor who has obtained an illegal contract out of which the injury

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arises, proceeds as it is claimed was done here, and thereby the state is estopped from preventing the injury and loss, and the public must submit, then it may be said that in almost every case, when the state and the public are interested the doctrine of laches would apply. The claim of laches here we think is not sustained.

The further claim is made that if the prayer of the petition is granted, that no benefit will result to the public, or if any should result, it would be very little and so trifling that a court of equity should not extend its aid. If the prayer is granted the only additional expense made apparent by the facts disclosed will be the advertisement for bids upon the detailed plans, specifications, etc., as modified. This will insure the competition required by the law. Upon the testimony produced it is shown that an opportunity will be afforded of determining whether the building, etc., upon such modified plans and specifications can not be built for very much less than the bid upon which the contract was awarded, saving to the memorial fund several thousand dollars.

There is testimony in the case, worthy of belief, showing that under the supplemental specifications upon which this contract was awarded, this building, with the walks, driveways, etc., can be built for \$190,000, and at a profit to the contractor. Here is a difference of \$21,000 which can not be regarded as a trifling sum.

It is further claimed that if the prayer is granted that it might result in the ultimate defeat of the building; whilst this is a claim wholly immaterial, and one not proper for the court to consider under the issues made, yet we are unable to see why such a result should follow, when the relief it granted will save several thousand dollars to the fund provided for the purpose, and at the same time enable the trustees to proceed according to the statute.

The contract entered into between the trustees and Ellis & Company is illegal and void, because the plans and specifications upon which it was awarded were not those caused to be prepared by the board, and upon which bidders were invited to bid, and hence not responsive to the invitation, plans and specifications;

other bidders not having the opportunity to bid for the contract awarded Ellis & Co., it therefore follows that plaintiff is entitled to the relief prayed for in its petition, and the same is granted.

E. L. Taylor, Jr., and Chas. J. Pretzman, for plaintiff.

J. E. Sater, for W. H. Ellis & Co.

Pugh & Stoddart, for trustees.

PROSECUTION UNDER THE BEAL LAW.

[Circuit Court of Belmont County.]

ARTHUR STEWART V. THE STATE OF OHIO.

Decided, December Term, 1903.

Sale of Intoxicating Liquor—Affidavit—Necessary Elements in, for Selling Contrary to Law.

An affidavit filed before a mayor for the sale of intoxicating liquor contrary to law, under the Beal Local Option Law, Section 4364-20b, Revised Statutes, should set forth the name of the party to whom the intoxicating liquor was sold, or that the name was unknown; but an objection to the affidavit on that ground must be pleaded before final trial in the mayor's court, or the same is waived.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Error to Court of Common Pleas of Belmont County.

Plaintiff in error asks for the reversal of the judgments below upon one ground only, and that is that the affidavit upon which he was convicted was not sufficient in law.

The affidavit was filed before the Mayor of the Village of Barnesville, this county, and charged the defendant, Stewart, with selling intoxicating liquor contrary to Section 4364-20b, Revised Statutes, known as the "Beal Act." The affidavit was for the unlawful selling under the section, and not for keeping a place for the unlawful sale of intoxicating liquors.

The defendant was found guilty by the mayor and sentenced to pay a fine of two hundred dollars and costs, it being his first offense. Error was prosecuted to the common pleas court

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and the judgment of the mayor affirmed, and the case is before this court to reverse the judgment of the lower courts.

The objection to the affidavit is that it does not state the party to whom the liquor was sold, neither does it set forth that the name of the party was unknown to affiant.

The affidavit not setting forth that the defendant had been convicted before under this section of the statute, the mayor had final jurisdiction, and the affidavit should therefore be substantially as formal in charging the offense as an indictment found by a grand jury.

We think the affidavit should have set forth the name of the party to whom the intoxicating liquor was alleged to have been sold. The accused was entitled to demand that the affidavit made against him should inform him of the nature of the charge specifically and definitely, so that he might precisely know what the charge was and be prepared to make his defense. He should not be required to meet a charge of selling to A, B, or C, or some other person, when the particular person was known to the affiant.

Furthermore, the affidavit should be so definite that there would be no difficulty, in case of another action for the same offense, in pleading former acquittal or conviction. It is true it might be shown upon the trial of another action who the party was to whom the sale was made by introducing the evidence adduced in the former action, but that would be attended with much difficulty, and, in some cases, impossible. Our Supreme Court has pronounced in no uncertain terms, and properly so, on the necessity of definiteness in criminal accusations for both these reasons.

We are aware that recent text writers on criminal proceedings take a decided position that it is not necessary to set forth the name of the party to whom the intoxicating liquor is sold, and they are supported by the decisions of many very creditable courts (McClain on Criminal Law, Volume 2, Section 1274), but we think the better authorities are the other way.

The statutes of our state, by inference at least, indicate that it is necessary to set forth the name of the party. Section 7222 provides that in an indictment for the sale of intoxicating

liquor it shall not be necessary to allege the kind of liquor sold, nor to describe the place where sold; and in an indictment for keeping a place where intoxicating liquors are sold in violation of law it shall not be necessary to allege the name of the person to whom intoxicating liquor was sold. This is almost equivalent to saying that for a sale it would be necessary to allege the name of the person.

In *Gordon v. State*, 46 O. S., 625, it is said:

“There was a motion to quash the indictment on the ground that it did not set forth the name or names of any person or persons to whom the sale of intoxicating liquors was made. The indictment alleged that the accused unlawfully sold intoxicating liquors as a beverage, to divers persons whose names to the jurors were unknown. This we deem sufficient. In those cases in which the names of third persons can not be ascertained they may be thus designated in the usual form as ‘persons whose names are to the jurors unknown.’”

In *Commonwealth v. Dean*, 21 Pickering, 334, it was held upon a motion to quash that:

“A complaint before a justice of the peace, intended to be the basis of a final judgment, alleging that the defendant, without license, ‘did sell spirituous and fermented liquors in a shop used for the purpose of tippling or gaming or in which tippling and gaming is allowed,’ is fatally defective, inasmuch as it did not state to whom the sale was made, or that it was made to a person unknown.”

The accused, plaintiff in error, went to trial without making any objection to the affidavit on this ground. He filed a motion to quash the affidavit—two of them—but for entirely different reasons; that the act was unconstitutional, etc.; but there was nothing in the motions indicating that he objected because the name of the party to whom the liquor was sold was not set out in the affidavit. After judgment he made no complaint, either in the motion for a new trial which he filed, or by motion for arrest of judgment. Will he now be permitted to complain for the first time in a proceeding in error? We think not. He can not experiment with a trial, and when the judgment is against him, then take advantage of a defect of this character. The defect is a matter of form in stating the offense, and while

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it would be fatal as against a motion before trial, we think that after judgment it is unimportant; at least, the defendant waived the defect. Had the defect been in an indictment, he must have raised it by motion to quash, or it would have been waived. R. S., Section 2249.

Such is the direct holding of the Supreme Court of Massachusetts in the case of *Green v. Commonwealth*, 111 Mass., 417.

The judgment of the court of common pleas in affirming the judgment of the mayor's court is affirmed.

Colpitts & Chappell, for plaintiff in error.

Smith & Howard, for defendant in error.

POLICE AND FIRE CHIEFS.

[Circuit Court of Butler County.]

STATE OF OHIO, ON THE RELATION OF JACOB SIPP, v. CHARLES A. STROBLE.

Decided, February 2, 1904.

New Municipal Code—Its Provisions With Reference to Chiefs of Police and Fire Departments—Identity of an Office—To Be Determined by Its Functions—A Superintendent of Police Under a City Charter Becomes Chief of Police Under the New Code—Chief of Fire Department.

1. The office of superintendent of police under the recent charter of the city of Hamilton has the same functions as the office of chief of police provided for under the Municipal Code of 1902, and is therefore identical, and being identical the occupant of the office of superintendent of police on the day the new code went into effect became, by virtue of Section 167 of that code, the chief of police of the city of Hamilton.
2. The same principle applies to the chief of the fire department of the city of Hamilton.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

We have had no trouble in coming to a conclusion that the charges filed with the mayor against the relator were insufficient

and that the trial under the same was void and of no effect in law.

We are further satisfied that the appointment of C. A. Stroble was contrary to law, Section 149 of the Municipal Code providing "The Chief of Police shall be appointed from the classified list of such department," because on the 15th day of August, 1903, the classified list as required by Section 153 in the Municipal Code had not been made up and established, and if it had, C. A. Stroble could not have legally been on it as he had neither passed an examination nor been a member of the police department prior to May 1, 1903, the time when the new code went into effect.

The only real difficulty is to determine the official status of Jacob Sipp, the relator herein, between May 1, 1903, the day when the new Municipal Code went into effect, and August 15, 1903, the day of the appointment of the said C. A. Stroble, and said Sipp's right under Revised Statutes 6764 to maintain this action. Prior to May 1, on April 28, 1903, Jacob Sipp was duly appointed to the office known as "superintendent of police" as provided by Section 18 of the then existing charter of the city of Hamilton, created by an act of the General Assembly passed March 25, 1898.

Section 149 of the new Municipal Code provides that:

"The police department of each city shall be composed of a 'chief of police' and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station-house keepers, drivers, and substitutes as shall have been provided by ordinance or resolution of council."

The cardinal question is whether or not the office of "*superintendent of police*" created under the charter is identical with the office of "*chief of police*" provided in the new code. If the office is identical, since the same permits of but one incumbent, then Mr. Sipp became by virtue of the new code, going into effect under Section 167, the chief of police of Hamilton. The case of *Kirker v. Cincinnati*, in the 48th O. S., page 507, is instructive on this point in distinguishing the case of *Reemelin et al v. Mosby*, 47 O. S., page 570:

"It is argued that the separate character of the two boards is recognized in *Reemelin et al v. Mosby*, 47 Ohio St., 570. This may seem so from the second clause of the syllabus. But no such question was involved, nor considered or necessary to be considered, in that case. It is true that the members of the new board are there referred to as members of another board. In one sense this is true, in another it is not. *With regard to the personnel, a change in the membership makes another board, but with regard to its functions, the board remains the same so long as its functions remain unchanged.*"

Here the court points out, that, under the general law, where the issue is as to the validity of their acts, the identity of two boards is to be determined by the identity of their functions, no matter what the respective names of such boards may be and regardless of the persons composing them. But here the general law is further modified by the express civil service provisions of the Municipal Code as to the police department, which provisions concern themselves particularly with the personnel of the office.

These provisions graft onto the law of the organization of the police department the principle of retaining in office those duly appointed to office. Section 167 provides:

"No officer or employe in the department of public safety shall be removed or discharged except for cause; and the cause of removal of any person shall be forthwith stated in writing by the mayor to the board, and shall be filed by the said board in its office, and shall be open to public inspection. No officer, secretary, clerk, sergeant, patrolman, fireman or other employe serving in the police or fire departments of any city of the state at the time this act goes into effect shall be removed or reduced in rank or pay except in accordance with the provisions of this act."

In the case at bar we find a substantial identity in the functions of the offices of superintendent of police under the old charter and of chief of police under the new code. We further find explicit statutory direction that the organization of the police department under the new code is to be made to fit so far as possible the conditions existing under the old charter for the purpose of preserving the personnel of the department and the

standing of the persons composing it. In this way only can Section 167 be given due effect. It would be impossible in any other way to keep Jacob Sipp on the force without reducing him in rank, as required by this section. Hence we are of opinion that on and after May 1, 1903, Jacob Sipp was under the law chief of police of the city of Hamilton.

No matter what the Supreme Court might now hold as to the constitutionality of the act of March 25, 1898, the decision of the Supreme Court in *State, ex rel Attorney-General, v. McMaken*, 59 O. S., 731, gave sufficient color of law to make Jacob Sipp a *de facto* officer on May 1, 1903. We are sustained in this view by what was evidently the view of the mayor and board of public safety at the time when they instituted proceedings against said Sipp. The idea that he could have sustained any other relation to the police department was only invented after the complete illegality and vanity of the proceedings against him became obvious.

We are therefore of opinion that a judgment of ouster should issue against C. A. Stroble and of re-instatement of Jacob Sipp.

M. O. Burns, Judge Neilan and Ellis G. Kinkead, for the relator.

Richard Shepherd and Warren Gard, contra.

STATE OF OHIO, EX REL ADAM BECKER, v. DAVID LINGLER.

PER CURIAM.

The principles recognized in the foregoing case are equally applicable to this case and lead to a similar conclusion.

A judgment will issue herein against David Lingler ousting him from the office of chief of the fire department and of re-instatement of Adam Becker to said office.

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PRIORITY OF LIENS.

THE CALDWELL BUILDING & LOAN ASSOCIATION V. BIGLEY ET AL.

[Circuit Court of Noble County.]

Decided, December Term, 1903.

When Lien of Reformed Mortgage Commences.

Where an action is commenced by the mortgagor against the mortgagee, upon an imperfectly executed recorded mortgage, for the purpose of having the same reformed and for sale of the premises.

Held: That judgment liens, obtained after the commencement of the action and before decree reforming the mortgage, do not have a preference over the mortgage lien, and that the claim of the mortgagor should be first satisfied out of the fund arising from the sale of the property.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Appeal from Court of Common Pleas of Noble County.

On the 14th day of January, 1902, the defendant, J. N. Bigley, contracted with the plaintiff, The Caldwell Building & Loan Association, for a loan of one thousand dollars. On the same day he delivered to plaintiff a bond and mortgage purporting to be signed by himself and wife in the presence of two witnesses and duly acknowledged for such loan, and the money was paid over to him. As a fact Bigley was the only one that signed the bond and mortgage, he having forged the name of his wife and the two witnesses to the mortgage, as also the name of the notary public to the acknowledgment, and fraudulently caused the seal of the notary to be attached. The mortgage was left for record with the recorder of the county the same day it was received, January 14th, 1902. The defendant, Daniel Swickard, on the 23d day of July, 1902, obtained a judgment before the Mayor of the Village of Caldwell against the defendant, Bigley, and on the same day filed a transcript with the Clerk of the Court of Common Pleas of Noble County; caused an execution to be immediately issued from said court, and on the same day it was duly levied upon the real estate described in the mortgage given to plaintiff. Alonzo Hall, another defendant, on No-

vember 20, 1902, recovered a judgment by consideration of the Court of Common Pleas of Noble County against the defendant, J. N. Bigley, which was on the same day levied upon the same property. On September 16, 1902, the defendant, Emily Baker, obtained a judgment before the same court of common pleas against the defendant, Bigley, which was on the same day levied upon the same property. July 28, 1902, the plaintiff, building and loan association, filed a petition in the Court of Common Pleas of Noble County on its mortgage to foreclose the same and for equitable relief, setting forth that the bond and mortgage was duly signed by the defendant, J. N. Bigley, and purported to be signed by his wife and two witnesses and to be duly acknowledged. After the levying of the executions as hereinbefore stated, the plaintiff filed an amended petition making said parties defendants to the action, setting forth in detail the facts in relation to the mortgage as to the forgeries and asking that it might be reformed; decreed to be a contract for a mortgage, or an equitable lien; also that the premises might be sold as prayed for in the original petition and the proceeds applied to the payment of its claim in preference to all others. To this petition all of said defendants answered claiming that their liens were superior to plaintiffs. The property was sold by consent of all parties, the proceeds brought into the court of common pleas and the question to be determined is as to the priority of the liens. The property did not sell for more than sufficient to pay the claim of plaintiff, and if the claims of defendants, or any of them, are superior in equity to its claim, the same will not be wholly satisfied.

It must be conceded that the mortgage of plaintiff was wholly ineffectual as a lien against third parties. It being neither executed or acknowledged in accordance with the statute its record was illegal and gave it no priority as against subsequent execution creditors (R. S., 4133, *Bloom et al v. Noggle et al*, 4 O. S., 45). At the same time it was good as between the parties as a mortgage or a contract for a mortgage giving the mortgagee a lien upon the property as between the mortgagor and mortgagee. *Bloom et al v. Noggle et al, supra*; *Van Thornley v. Peters et al*, 26 O. S., 471.

The question then arises, what is the legal effect of the plaintiff commencing its action to enforce its lien upon the property against the defendant, J. N. Bigley, who was the owner of the property? The action was not *in personam* in any sense but *in rem*; it was not for the purpose of obtaining a judgment or other relief against the defendant, but only that its mortgage might be perfected and foreclosed, or that the contract of Bigley might be specifically enforced by the sale of the property to pay the claim of plaintiff. It is conceded, as it must be, that the mortgage might be divested of the fraud perpetrated by Bigley upon the association and be reformed so as to make it comport with the true contract made by the parties; but it is insisted that the action has no effect as to third parties, until such reformation takes effect by the decree of the court made in the action and the judgments and levies having been obtained before such decree that the defendants have the prior lien.

In support of this position the decisions of *Bloom et al v. Noggle et al*, *supra*, and *Van Thornley v. Peters et al*, *supra*, are invoked.

In the latter case it is held:

“A defective mortgage when reformed will not affect the lien of a judgment rendered between the date of the execution and the reformation of the mortgage.”

In the opinion McIlvaine, J., says:

“1. A mortgage defectively executed is not entitled to record under our registry laws. 2. An unrecorded mortgage, or a defectively executed mortgage, whether recorded or not, does not vest in the mortgagee any interest in the premises, either legal or equitable, as against subsequent purchasers, or judgment creditors of the mortgagor. 3. As between the parties to such mortgage, whether it be duly executed and not recorded, or defectively executed and recorded or not, equity will give it effect, according to the intention of the parties. 4. A defective mortgage, when reformed, will not affect the lien of a judgment intervening between the date of the execution and the reformation.”

Not only in this case, but in a number of others of the same character decided by the Supreme Court, the language used

is "when reformed," but it will be observed that in all the cases in which the language is so used the liens of the third parties attached before the commencement of the action by the party holding the defective mortgage for the enforcement of his lien. Certainly such holding can not affect the provision of Section 5052 of the Revised Statutes.

By that section it is provided:

"When summons has been issued, or the publication made, the action is pending so as to charge third persons with notice of its pendency; and, while pending, no interest can be acquired by third persons in the subject of the action as against the plaintiff's title."

The provision is, "While pending no interest can be acquired by third persons in the subject of the action as against the plaintiff's title." The recovery of a judgment and levying of execution was the acquiring of an interest in the subject of the action against the title of the plaintiff, although that title may have been defective.

In *Tollerton v. Williams*, 30 O. S., 579, it is held:

"If a petition for divorce and alimony by the wife, specifically describes certain real estate of the husband, charging it with equities of the wife, and asking an injunction to prevent alienation *pendente lite*, and also equitable relief, and the decree therein is such as that from it, it may be found that the court acted on those equities and favorably thereto, the proceeding operates as a *lis pendens*, and the decree for alimony and settling equities will be a lien on the lands, preferable to that of a mortgagee who had actual notice of the proceedings for divorce and alimony, and whose mortgage was executed and recorded, pending those proceedings."

No injunction was granted in the action. Neither did the court in the decree find that there were any equities in favor of the wife except what arose out of the marital relation—the responsibility of the husband for the maintenance and support of the wife.

Wright, J., in the opinion says:

"But again in the divorce suit, this land was specifically described, an equity in it was claimed, an injunction asked to prevent the husband from disposing of it *pendente lite*, of all

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of which Tollerton had notice when he took his mortgage, and in the decree the alimony was fastened upon the land.

"In the case of *Hamblins Lessee v. Bevans*, 7 Ohio (pt. 1), 161, which was a question of priority between judgments and a decree for alimony, the court say: When the object of a suit, in law or equity, is to recover specifically a described piece of real estate, the pendency of the suit is held to be notice to all the world of the claim, and a final judgment or decree in his favor over-reaches intermediate purchases—that is, purchases made pending the suit. So if the suit be against a trustee to affect his title to land as trustee, and a final decree be rendered to that effect, the land is bound from the service of process.

"In that case the court observe that the petition for divorce alleged no claim to any specific tract of land. It is said that a purchase from a defendant in a bill to enforce an equitable right of any kind will not confer a valid title. *White v. Tudor*, 2 Leading Cases in Equity, (pt. 1), 192.

"In the case before us the property is described so that any who chose to inquire might find out precisely what it is.

"In addition to the wife's equity her alimony is sought to be charged upon it, and an injunction is asked to prevent any alienation. If that injunction had been allowed, it would not have been any further notice than the mere filing of the petition to Tollerton, the mortgagee. The notice of injunction would not have been served upon him, but upon the husband. These facts, it appears to us, make such a case that the mortgage must be considered as having been made *pendente lite*, and that it is a lien inferior to the decree."

In the original case as stated no injunction was granted. The court made no finding or entered any decree upon the claimed equities of the wife. The petition simply described the land and the decree was for five thousand dollars in gross as alimony and charged the same as a lien upon the land described in the petition; and yet upon petition filed to marshal liens and sell the land the court held as we have seen that the claim for alimony took preference over a valid mortgage obtained during the pendency of the suit under the equitable doctrine of *lis pendens*.

The case of *Barry v. Hovey et al*, 30 O. S. Rep., 344, was much like the case before us.

The principal controversy was between two mortgagees holding mortgages from the same mortgagor upon the same real

estate. Robert Barry held the first mortgage and it was first recorded, but had but one subscribing witness. The mortgage to John Barry was given after the mortgage to Robert Barry, and was duly executed and recorded, but was secured after the suit had been instituted by Robert Barry to reform and correct his mortgage, in which action a defective service of summons had been made. The syllabus of the case is as follows:

“In an action by a mortgagee against a mortgagor, to reform and correct a mistake in a recorded mortgage which had but one attesting witness, a summons was duly issued to the sheriff, who, without writing endorsed thereon, as required by Section 61 of the Civil Code, appointed one C to serve the same as required by law, and verified his return which was endorsed on the writ. *Held*: That such service and return by C, without being duly authorized by an appointment in writing endorsed on the writ, is not such a service as will charge third persons with notice of the pendency of an action as provided in Section 78 of the Civil Code.”

Johnson, J., in the opinion says:

“The mortgage to Robert Barry, though first entered for record, having but one witness, was defectively executed, and did not, as against a subsequent valid mortgage entered for record, vest any interest either legal or equitable in the mortgage. *Bloom v. Noggle*, 4 O. S., 45.”

It follows therefore that the mortgage to John M. Barry, which was executed December 28th and entered for record December 30th, is paramount to that of Robert Barry, unless the proceedings instituted by him December 21st, 1872, to reform and correct his mortgage, which subsequently ripened into a decree to that effect, restores him to that priority to which he would have been entitled if his mortgage had not been defective.

The court below held that the proceedings by Robert Barry to correct his mortgage were *lis pendens* by the service made December 26, 1872, as amended at the June Term, 1873, so as to charge John M. Barry with notice of its pendency.

By the terms of the statute John M. Barry's mortgage took effect December 30th. At that date the petition had been filed, and summons issued and returned to the clerk's office showing

that it had been served in the proper manner by one John H. Camden, but showing no authority in him to make such service. The service was directed to the sheriff, but it had no appointment endorsed on it which would authorize Camden to serve it.

This presents the question whether a service made by a private person, under a verbal appointment, or one not endorsed on the writ, is such service as to make the case a pending action as to third persons, and if not, whether the amended return cures the defective service.

The Code, Section 78, provides that: When the summons *has been served* or publication made, the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title, "in this case the plaintiff's title was an equitable one. If his action was pending, by virtue of the service made by Camden on the 26th day of December, then there is no error in this judgment, otherwise there is, unless the amended return cures the defect."

The learned judge then proceeds to show that the action was not commenced at the time John M. Barry took his mortgage and had the same recorded, by reason of the defective service of summons, and that the return could not be amended in the manner attempted after decree.

It would seem as if this case was conclusive upon the question. That after service of summons duly made and returned that no interest could be acquired by a third person in the subject matter of the action as against plaintiff's claim, and there is no question but that in this action summons was duly issued, served and returned before any interest was obtained by the execution creditors.

From these authorities it seems to us that what is said in the first paragraph of the syllabus of *Van Thornley v. Peters et al* with reference to the reformation of the instrument, has reference to the action for reformation and was in no way intended to qualify the generally accepted interpretation of Section 78 of the Code of Civil Procedure, now 5052 of the Revised Statutes.

Another question is made and that is that the amended petition not being filed until the judgment creditor's liens attached that no rights were acquired under Section 5052.

As we have stated the original petition was to secure plaintiff's rights in the real estate, which was specifically described. The object was to have its equities in the same determined. The amended petition was for practically the same purpose. There was no departure. The facts were simply set out more in detail and in no manner changed the cause of action.

In the case of *Lessee of Stoddard v. Meyers*, 8 Ohio R., 203, the syllabus reads:

"Judgment reversed pending a bill to subject land to satisfy it, and again recovered, the bill being continued, and a supplemental bill being filed to reach the case of the second judgment, an alienation after the reversal and before the second recovery, is affected by the *lis pendens*."

In the opinion Lane, J., says:

"The general rule that no alienation of property is permitted whilst a suit is pending in relation to it, either in law or equity, is familiar and well settled (3 Ohio, 542; 5 Ohio, 462). It is assumed that when the right to recover, in the bill in equity, was taken away by the reversal of the judgment, the suit ceased to be pending so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems plain that by the institution of a suit the subject of litigation is placed beyond the parties to it; that whilst the suit continues in court it holds the property to respond to the final judgment or decree. This suit instituted in 1831 was regularly continued until the final decree in 1835. The supplemental bill was engrafted into the original bill, and became identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation."

It follows that the decree must be that the claim of defendant, Daniel Swickard, be first paid out of the fund after payment of costs, and the balance not being sufficient to pay the plaintiff's claims in full, that residue be paid over to it.

Decree accordingly.

McGinis & Dye, for plaintiff.

Spriggs, Kountz, Morris & Frazier, for defendants.

SPECIFIC PERFORMANCE OF BUILDING CONTRACTS.

[Circuit Court of Franklin County.]

THE CITY OF COLUMBUS v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND THE CITY OF COLUMBUS v. THE PITTSBURGH, CINCINNATI CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, January 19, 1904.

Building Contract—Specific Performance of, will be Decreed, When—Purpose of the Structure Sufficiently Defined, When—Possibility of Change of Ownership of the Property.

1. The general rule that a court of equity will not decree specific performance of a building contract does not apply where it is not competent for the plaintiff to enter upon the defendant's premises to build, and where a measureable money equivalent can not be had.
2. Where the contract of the defendant is to do defined work on his property, and the performance in specie will alone answer the purpose of justice, the court of chancery will compel a specific performance, instead of leaving the plaintiff to an inadequate remedy at law.
3. In such case, where the purpose to be accomplished by the structure is expressed in the contract, and can be easily performed, the building is, for that purpose, sufficiently defined.
4. Where the violation of the contract is flagrant and the injury serious, the court will not withhold a decree in specific performance, for that there is a possibility, but no pending probability, of its becoming inoperative by a change in the ownership of the property.

WILSON, J.; SUMMERS, J., and SULLIVAN, J., concur.

These actions come into this court on appeal from a judgment in the court below, sustaining a general demurrer and dismissing the petition in each case. They are submitted together as involving the same questions of law.

The actions are brought to enforce the specific performance of a contract made by the defendants, respectively, with the plaintiff in and about the erection of the viaduct on High street in said city. The contract is attached to the petition. The particular stipulation which is brought into question is con-

tained in what is designated as section fourteen of the contract. It reads as follows:

“In consideration of the first party (the city) constructing the viaduct at the elevation shown upon said plan hereto attached, said second and third parties will, at their own expense erect, or cause to be erected, on their property fronting on the viaduct and its High street approaches, *neat and ornamental buildings* to obstruct from the part of said viaduct immediately opposite their said property the view of cars and engines; the construction of said buildings to be commenced within sixty days after the completion of said viaduct, prosecuted without unnecessary delay, and fully completed within two years from the completion of the viaduct. This stipulation shall not create any lien, charge or incumbrance on said fronting property, nor impair in any wise, the right or power of said second and third parties to lease, sell, convey or dispose of said property, or any part thereof, free from any claim or lien of the first party, arising out of this agreement; nor shall such lease, sale, conveyance or disposition release said second and third parties from their obligation to erect said buildings, or to cause them to be erected.”

The city pleads compliance with all of the terms of the contract on its part, and avers in the first case that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, owning property fronting on each side of the viaduct, and still being in possession of the same, has failed and refused, and still refuses to erect the buildings as it has agreed to do; and in the second case that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, owning and in possession of property fronting on both sides, having complied with the contract to the satisfaction of the city as to the property on the east side, has failed and refused, and still refuses to erect the buildings on the west side thereof.

The question raised upon the demurrer is: Do the petitions state a case for specific performance? The propositions made in support of the demurrer are: That the city is without power or authority to enter into the contract; that as a general rule courts of equity will not order the specific performance of a building contract, and the petitions do not state a case within any of the recognized exceptions to the rule; that the contract

is too indefinite and uncertain to form a predicate for such decree, and that, it being in the power of the defendants to render the decree inoperative by selling or leasing the property, the court will not order specific performance.

As to the first proposition it may be conceded, upon the authorities cited, that the city, on its administrative side, is without power to enforce the erection of these buildings; such power not being within any legislative grant, or a proper exercise of the police power. But we know of no authority, and none is cited, which will prevent the city, as a private business corporation, from entering into any contract that it may have good reason to believe advantageous and beneficial to the citizenship; and such, in our view, is the contract in question.

The general rule that a court of equity will not decree specific performance of a building contract does not apply where it is not competent for the plaintiff, or any one for it, to enter upon the defendant's premises to build, and where a measurable money equivalent can not be had.

In a foot note to the case of *Moseley v. Virgin*, 3 Ves., 184, the reason for the rule is said to be, "If one will not build, another may, and there can be a full compensation in damages."

The exceptions to the rule and the authorities sustaining them are collected in a note to Section 1402, Pomeroy's Eq., Vol. 3, p. 445. From them we quote:

"This court has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages." *Storer v. Great Western Ry. Co.*, 2 Young & C. Ch., 48.

"Where from the nature of the relief sought performance of a covenant in specie will alone answer the purpose of justice, the court of chancery will compel a specific performance, instead of leaving the plaintiff to an inadequate remedy at law." *Stuyvesant v. The Mayor of New York*, 11 Paige's Ch., 414.

Another exception to the general rule, well sustained by authority, is where there has been a part performance, so that the defendant is enjoying the benefits in specie.

The cases at bar come clearly within the exceptions if the work is sufficiently defined. The relief here sought is, in the language of the contract, the erection of "neat and ornamental buildings, to obstruct from the part of said viaduct immediately opposite their (the defendants) said property the view of cars and engines."

Nothing short of performance in specie will accomplish this purpose and at the same time give to the viaduct the appearance and advantages of a continuous street. Nor is it perceivable how a rule in damages could be framed so as to give adequate relief.

But is the contract sufficiently definite?

In the case of *Price v. Corporation of Penzance*, 4 Hare, 507, the contract was that the corporation, having purchased the plaintiff's land, "should at their own expense make a street, and also a market."

The vice chancellor said:

"Under this contract the corporation has taken possession of the land and converted it; and having had the benefit of the contract in specie as far as they are concerned, I need not say that the court will go to any length which it can compel them to perform the contract in specie."

The court asked this question, however: "If I make a decree for the performance of the contract, how is the court to know when the contract is performed?"

Subsequently the corporation having by resolution declared that the market should be one for the sale of fish and shoes, the court said in a further hearing of the case: "This has gone far to remove the difficulty to which I have adverted." Thereafter the corporation performed the contract, leaving the case to be adjudged as to the costs only.

In *Sanderson v. Cockermouth & Workington Railway Company*, 11 Beavan, 497, "A railway company about to sever the plaintiff's land by their railroad agreed to purchase the necessary portion of land, subject to making such roads, ways, and slips for cattle as might be necessary." And, having taken possession, and severed the land, the court held that

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“though it was difficult to execute an agreement thus expressed, yet that the plaintiff was entitled to specific performance; that the word ‘necessary’ must receive a reasonable interpretation.” And it was held to mean “Such roads, ways, and slips for cattle, as might be necessary and proper for convenient communication between the severed portions of the plaintiff’s land.”

In *Storer v. Great Western Railway Company, supra*, “The defendants agreed to purchase so much land as was necessary for their purposes, at a price named, and to construct and forever thereafter maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the archway, at such place as the plaintiff, his heirs and assigns, should think most convenient, in his pleasure grounds, and should form and complete the approaches to such archway.” The vice chancellor said:

“There is no difficulty in enforcing such a decree. The court has to order the thing done, and then it is a question capable of solution, whether the order has been obeyed.”

In *Lawrence v. Saratoga Lake R. R. Co.*, 36 Hun. (N. Y. Sup. Ct.), 467, the contract provided among other things, that:

“The defendant should simultaneously with the construction of said railroad erect at or near Excelsior Spring, owned by the plaintiff, a *neat and tasteful* station building, for the accommodation of passengers to and from said spring, which shall be a regular station of the road, and all regular trains shall stop at said station, the name of which shall be Excelsior Spring Station. *Held*: That the defendant could, and should be compelled to specifically perform the said agreement.”

This case is approvingly cited by the New York Court of Appeals in *Prospect Park & Coney Island R. R. Co. v. Coney Island & Brooklyn R. R. Co.*, 1 Am. & E. Eq., 395. These cases are cited because the contracts might be said to be indefinite, and because they illustrate the length to which the courts of equity will go in order to do justice between the parties.

There is a class of cases holding that kindred contracts can not be specifically performed. *Port Clinton R. R. Co. v. C. & T. R. R. Co.*, 13 O. S., 545, is a leading case in that class.

In the nature of things this must be so, for the reason that some such contracts are capable of being performed while others are not. It is not then so much a question of authority as it is to which class does the contract belong; always remembering that a doubtful case will be cast on the side where complete justice can be done.

In the light of all the authorities there are no insuperable difficulties in the contract sued upon here. The words "neat and ornamental" should receive a reasonable construction, looking to the purpose it is sought to accomplish. The contract specifies the purpose, in so far as the city is concerned. It is to obstruct the view of cars and engines, to persons and animals crossing the viaduct—a very useful purpose, and, it would seem, very easy of accomplishment to the satisfaction of the city. The fact that one of the railroad companies has erected buildings on the east side of the viaduct satisfactory to the city is a demonstration of this view of the contract.

The defendants should not be heard to complain of the latitude in the contract, which will permit them to erect buildings suitable otherwise to their own purposes, and within their discretion as to cost and material.

The court will not assume for the purpose of defeating the contract that they will use material they should not, or that they will build other than upon approved architectural lines. Nor will the court be without power to execute its decree. It could, under the contract, enjoin the erection of a building that was being made purposely grotesque and unsightly, or that was plainly fraudulent and evasive of the contract. The same power will execute the decree.

A more serious question is, whether the court should order specific performance in the face of the other stipulation that the property may be leased or sold free from incumbrance. As a general proposition, it may be stated that the court will not do a vain thing, and that it would be vain to order specific performance if the defendants have the right at any time to revoke or annul their obligation to perform. *Marble Co. v. Ripley*, 10 Wall., 339; *Express Co. v. Railroad Co.*, 99 U. S., 191; *Rust v. Conrad*, 47 Mich., 449.

These stipulations are not easily reconcilable. Ordinarily the right to sell the property free from incumbrance would imply the right to hold it unincumbered in order that it might be so sold at any time. But this would be in plain contradiction of the obligation of the railroad companies to build these structures; and if this interpretation is to obtain, it would seem that the contract had been purposely made to be broken, in order that an abatement in the consideration might be sought in the way of damages. Such indirection is not fairly presumable. A more reasonable construction would be that the railroad companies should build the structures at all events if they remained in possession; but if they proved to be a losing investment, so that their maintenance would be a charge and incumbrance upon the property to the diminution of its value, they should have the right to lease or sell the property freed from any such liability.

It is a familiar principle in specific performance that a party to a contract may, at the election of the other party, be compelled to perform to the extent he is capable, before resort is had to the remedy at law.

In this case the plaintiff is entitled to have the contract executed during the time the defendants remain in possession, in order that it may, to that extent, enjoy the protection and the benefits flowing from it. This is particularly true when it is obvious the remedy in damages is wholly inadequate.

There was no want of mutuality in this contract at the time it was made, and can be none so long as the defendants remain in possession. That there may be such between the plaintiff and the lessees or assignees of the defendants is a question with which the court is not now concerned. The power of revocation or annulment of this stipulation to build is not vested in the defendants. On the contrary, it is expressly, and by the last words on the subject, inhibited. To this extent these cases are distinguished from the authorities above cited, upon which the defendants rely. That it may exist in the lessees, or assignees, is no defense here. They may not elect to exercise it, but may buy or lease for the express purpose of complying with the contract. If it be a sale or lease of the property "fronting"

on the viaduct, and nothing more, it is difficult to see how they could be benefited without compliance. Their property would be "in air" until it was physically attached to the viaduct by some structure fronting thereon. Just what is meant by property fronting on the viaduct at an agreed elevation, and whether the sale or lease of the property for railroad purposes only would absolve the defendants from the liability to perform, are questions which do not arise upon the petition and may be reserved for that contingency. It might also become a question whether a sale or lease agreed upon for the express purpose of defeating the contract could be upheld in equity.

Where the violation of the contract is flagrant and the injury serious, the court will not withhold a decree in specific performance merely for the reason that there is a possibility, but no pending probability, of its becoming inoperative by a change in the relation of the parties.

As is said by Judge McIlvaine, in *D., X. & B. R. R. Co. v. Lewton*, 20 O. S., 411, "Whether a court of equity has power to decree and means to execute its decrees in such cases are the ultimate questions in this case, and not preliminary ones." If the want of power does not necessarily appear from the facts pleaded, the court should not be called upon to determine that question upon demurrer to the petition.

The demurrer to the petition will, in each case, be overruled.

Butler & Marshall, for plaintiff.

W. O. Henderson, for P., C., C. & St. L. Ry. Co.

J. F. Wilson, for C., C., C. & St. L. Ry. Co.

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BAILMENT.

[Circuit Court of Jefferson County.]

A. W. McDONALD & COMPANY V. JOHN A. MISER.

Decided, November Term, 1903.

Burden of Proof—In an Action Against Bailees.

In an action against the bailees of a team of horses, for causing the death of one of the horses and injuring the other by negligently driving the same, the burden is on the bailor to prove negligence, and it is not shifted by showing the horses were sound when delivered to the bailees; the bailor being immediately informed by the bailees of the circumstances attending the injury to the team.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

The action below was to recover damages for negligently causing the death of a horse of plaintiff and for injury to another. Plaintiff hired defendants a team of horses to do certain hauling upon their contract of building a section of railroad. The averment of the petition is:

“That by reason of placing said horses in the hands of a different driver than the one agreed upon, which driver was incompetent to handle and properly care for said horses, and by reason of the negligence of said defendants in handling said horses and immoderately driving said horses and failing to take proper care of said horses one of said horses was killed and the usefulness of the other horse was greatly impaired for some time thereafter, to the damage of the plaintiff in the sum of \$200.”

To this petition there was a general denial—also an averment in the answer that the horses were unfit to perform the services for which they were hired. This averment was denied in the reply. The evidence showed that one of the horses died while it was being driven and that the other horse was also in bad condition when it was returned to plaintiff. The evidence further tended to show that the servants of defendants drove said horses after having knowledge that the horse that died was entirely unfit to be driven, and that the other was fagged out and not in good condition. The evidence further showed that plaintiff was immediately informed of the death of the horse and the manner

in which it died, its symptoms, etc.; the claim being made by defendants servants that they had in no manner abused the horse and that the symptoms indicated colic which had been occasioned by previous bad feeding on the part of plaintiff.

The case under the evidence was not a clear one as to negligence and the jury would have been justified in finding for either plaintiff or defendant under the issues made.

Under these issues and this evidence the court charged the jury at request of plaintiff as follows, upon the question of the burden of proof.

“If you find from the evidence that the team of horses was in good condition when they were delivered to the defendants to be used as on the occasion mentioned in the plaintiff’s petition, and one of them was dead and the other injured when returned, the burden of proof is upon the defendants to show that they used said team in a careful manner and as an ordinarily prudent man would have used them under similar circumstances. The law is that when property is received by the hirer thereof in a good condition and returned in a bad condition or not returned at all, the person so hiring said property is presumed to have acted negligently.”

In the general charge the court further said to the jury:

“Now the burden of proving the agreement set forth in the petition as to the way the horses were hired, etc., is upon the plaintiff. He must satisfy you by a preponderance of the evidence that what he sets forth in that regard is the truth; but the burden of proving that the defendants, under the circumstances, exercised ordinary care and diligence in the use and management of this team is upon the defendants under the circumstances, and also the burden is upon the defendants of proving that the plaintiff was negligent in the manner set forth by defendants, and that such negligence contributed directly to produce the injury to such team.”

As stated the action was for negligently driving the horses. It was not for conversion of the horses or either of them, and whatever may be the rule as upon whom the burden rests in an action for conversion by the bailee, if it is different, would not apply in this case.

It is insisted by counsel that in all cases of bailment where the property is delivered in good condition and destroyed or returned in an impaired condition that the burden rests upon the bailee to show that he was without fault; that the rule arises from the necessity of the case, as the bailor would have no knowledge as to the manner in which the property was taken care of.

It may be conceded that where property is delivered to the bailee in good condition and it is destroyed or returned in an impaired condition and he gives no reason for its destruction or impairment, that that would make a *prima facie* case of negligence. The mere fact that he received it in good condition and did not so return it, would be some evidence of negligence, especially so when he gives no reason why he did not return it in good condition, and, were there no other evidence, would justify a jury in finding that the defendant was guilty of negligence in its destruction or impairment; but we do not think that in a case like this where there is a large amount of evidence, part of it tending to show that the bailees were guilty of negligence and some that they were wholly without fault, that it is proper to charge the jury that the burden rests upon the defendants bailees to show by a preponderance of the evidence that they did not act negligently in the use of the property.

We are aware of the fact that there are courts worthy of great consideration that so hold. *Cummins v. Woods*, 44 Ill., 416 (92 Amer. Dec., 189) and cases in the note.

It seems to us that in the cases so holding that there is confusion in confounding evidence making a *prima facie* case or the burden of evidence, as it is sometimes called by text-writers, and the burden of proof in the case, and upon whom it rests.

The party upon whom the burden of proof rests is made by the pleadings and continues from the first stage of the trial to its end. He who affirms must prove. The burden of evidence shifts but the burden of proof never shifts. Mr. Taylor, in his work on Evidence, Vol. I, page 276, says:

“It is hardly necessary to say that the burden of establishing a case does not shift. It can not shift simply because the issue has been fixed once for all by the pleadings and the rules of pleading do not permit it to be altered, during the progress of the trial on those pleadings.”

In *Willett v. Rich*, 142 Mass., 365 it is said:

“We understand the doctrine to be well settled in this commonwealth that the burden of proof never shifts, and we think in the case we are discussing and in the case at bar, the burden to show negligence was upon the plaintiffs from the beginning and remained on them throughout the trial.”

That case was an action against a warehouseman. They received goods in good condition and did not return them in the same condition for the reason that they were injured by the fall of the warehouse. The court decided:

“In an action of contract against a warehouseman for a failure to keep safely goods entrusted to him, if it appears that the goods were returned in a damaged condition and that the damage was caused by the fall of the warehouse, the burden of proof is on the plaintiff to show that such damage was caused by the negligence of the defendant or his servants.”

In the opinion, Morton, C. J., says:

“The fundamental rule as to the burden of proof is, that whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such fact. In Stephen’s Digest of the Law of Evidence, the rule is stated to be ‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist. Steph. Ev. (Amer. Ed.), 175’.”

Again the learned judge says:

“It may be that where there is a refusal to deliver the plaintiff may make out a *prima facie* case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden originally on the plaintiff to prove a breach of contract.”

It should be stated that the declaration in this case contained two counts and was tried on the second which contained the averment that the goods were injured through the negligence of defendants and their servants.

The case of *Clafflin et al v. Meyer*, 75 New York Rep., 260, was an action against a warehouseman for failure to deliver goods

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deposited with him which had been stolen from the warehouse, and the court held:

“In an action against a warehouseman for refusal to deliver goods entrusted to him, where the refusal is explained by the fact appearing that the goods were lost by a burglary, the burden is upon the plaintiff to establish affirmatively that the burglary was occasioned by, or was not prevented by reason of some negligence or omission of due care on the part of defendant; the court will not assume in the absence of proof that the loss was the result of his negligence.

“The warehouseman in the absence of bad faith is only liable for negligence, and one bringing an action against him for the loss of goods must allege and prove negligence; this burden is never shifted; if plaintiff prove demand and refusal to deliver, this unexplained is *prima facie* evidence of negligence; but if it appear that the goods have been lost by theft, plaintiff must show that the loss arose from the negligence of defendant.

“Where, therefore, the facts proven are as consistent with due care as with want of it plaintiff can not recover.”

In the opinion Hance, J., says:

“It will be seen as the result of these authorities that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proven by reasonable certainty. Nor do we concur in the view that there is in these cases any real shifting of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the court as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.”

A clear distinction between a *prima facie* case or the burden of evidence, and the burden of proof, is made in the case of

Oaks v. Harrison, 24 Ia., 179, referred to in Taylor on Evidence, 1st Volume, page 276, under the heading "Burden of Evidence." It is there said:

"The duty of introducing evidence to prove or prevent proof of facts in issue is not, like the burden of establishing, a resultant of the pleadings. Its position, as between the parties, is determined, not by the state of the pleadings, but by the logical state of the case. The issue being fixed, the logical interest of one party is to produce an affirmative conviction on the part of the tribunal. It is the object of the other party to prevent it. Such a state of the evidence as would, if undisputed, produce such affirmative conviction, constitutes a *prima facie* case. It merely repeals the statement, therefore, in another form, to say that the interest of one party is to establish such a *prima facie* case, and of the other party to destroy it, either by establishing a *prima facie* case of his own, or by reducing the probative force of the opposing case below the required standard. Should this effort succeed, the necessary consequence is that the burden or necessity rests on the first pleader to introduce additional evidence with a view to strengthening his former proof into a *prima facie* case, either by disproving the facts alleged against it, or by proving additional facts. If, when the evidence on both sides is all in, the pleader who has the affirmative of the issue remains with what the tribunal considers the equivalent of a *prima facie* case, he succeeds; otherwise not. The necessity for having the final tip of the scale in his favor has not changed since the pleadings placed it on him, however many times the probative scales may have changed in their balance. When upon all the facts, the case is left in equipoise, the party affirming must fail."

Then the learned author on evidence, under the head of "The Burden of Evidence Shifts," says:

"It follows from what has been said that this burden of introducing evidence to prove or disprove a *prima facie* case may, and frequently does, change from one side to the other. A fair test of where it rests at any particular stage of the case is to answer the question: Against whom would the tribunal decide if no further evidence were introduced? Applying this test, it is obvious that at the opening of the case the burden of establishing and the burden of evidence rest on the same person (*Vriets v. Hagge*, 8 Iowa, 163, 192). Upon the establishment by him of a *prima facie* case, while the burden of establishing remains, the burden of evidence is obviously shifted (*Powers v.*

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Russell, 13 Pick., 69, 77; *Tolson v. Inland, etc., Coasting Co.*, 6 Mackey, 39; *Penitentiary Co. v. Gordon*, 85 Ga., 159; *Ketchum v. American, etc., Express Co.*, 52 Mo., 390). The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony; the other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue (*Scott v. Wood*, 81 Cal., 398).

“During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by that is, that there is a necessity of evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial (*Heinemann v. Heard*, 62 N. Y., 448, 455). The Supreme Court of Texas, after saying that the fact that the negative form of the issue does not determine the burden of proving, add, ‘Much less does the fact that a defendant is forced to maintain the affirmative of some fact, in disproving the plaintiff’s case, shift upon him the burden of proof’ (*Clark v. Hills*, 67 Texas, 141; *Small v. Clewley*, 62 Me., 155; *Jones v. Simpson*, 116 U. S., 609; *Harris v. Harris*, 154 Pa. St., 501.” To the same effect see *Lawson on Bailments*, page 543; *Amer. & Eng. En. of Law*, (2d Edition), 3d Vol., page 750.

In the case at bar as we have said the plaintiff averred in his petition that the death of one horse and the injury to the other was caused by the negligence of defendants and their servants; this was denied by the defendant and the further averment that the horses were unfit for the services for which they were hired. The fact that the horses were in good condition when hired and were not so returned possibly might make a *prima facie* case of negligence against defendants which they would be required to meet by evidence, but that *prima facie* case was met by evidence strongly tending to show that it was no fault of defendants that one of the horses died and the other was impaired, and that it arose from the condition of the horses when hired.

It then became the duty of the plaintiff to strengthen his *prima facie* case by showing the defendants were negligent, or overcome the proof offered by the defendants, and when the whole evidence was in under the pleadings the greater prepon-

derance of evidence should have been in favor of the plaintiff and the court should have charged the jury that the burden of proof showing negligence was upon the plaintiff instead of the reverse. Directly in point is the case of *Maloney v. Taft*, 15 Atlantic R., 326, wherein it is held:

“In an action on the case for negligence against the bailee of a horse for hire, the burden is on the plaintiff to prove negligence, and it is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned, that it was injured in a way that does not ordinarily occur without negligence.”

A misdirection of the jury as to the burden of proof is error for which the judgment will be reversed at the instance of the party prejudiced thereby (*McNutt & Ross v. Jacob Jaufman*, 26 O. S. Rep., 127). Judgment of court below is reversed for error in charge and cause remanded for new trial.

Henry Gregg and J. C. Bigger, for plaintiffs.

D. M. Gruber, for defendant.

VIOLATION OF CONTRACT TO TRANSFER BUSINESS AND GOOD WILL.

[Circuit Court of Cuyahoga County.]

HORACE W. POWER V. GEORGE G. BROWN.

Decided, November 30, 1903.

Contract—Divisibility of—Where an Insurance Agent Undertook to Transfer his Business to Another—And not to Solicit this Business in the Future for an Outside Company—Measure of Damages for Failure to Comply with Latter Provision.

B. contracted with P. to use his best efforts to place the insurance business which he then had with the company represented by P., and to turn over his good will to P. and his interest in all renewals after the first year, and not to solicit said business in the future for any outside company. B. carried out this contract to the extent of transferring the business to P. and carried out the remainder of the contract in part, but it is complained that he solicited and obtained for another company a comparatively small

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part of the business which P. had received from him or through his efforts. *Held:*

1. That the contract is divisible, and should not be treated as an entirety.
2. That the only right accruing to P., through the failure of B. to abide by the latter part of the contract, is a claim for compensation in damages for the amount of business thus diverted from his agency.
3. It is for the jury to say, in fixing the damages to be recovered in such a case, whether the commissions which went to an outside company would have gone to P., in the absence of efforts on the part of B. so to divert them.

MARVIN, J.; HALE, and WINCH, J., concur.

Error to the court of common pleas.

Suit was brought in the court of common pleas by Brown against Power, claiming to recover a balance due to him for commissions which had been put into the hands of Power upon certain insurance policies issued by Power to parties who had been taking their insurance from Brown and by his influence had been induced to take policies in companies represented by Power. Both Power and Brown were insurance agents in the city of Cleveland.

On or about the 15th day of November, 1897, Brown, deeming it best for some reason to have parties who were insured in the company represented by him re-insured in some other company, entered into an arrangement with Power by which he (Brown) was to transfer certain business to Power. This is evidenced by a writing, in the following words:

"Confirming my proposition, I propose to use my best efforts in placing this business with your company, and on all business so placed and premiums collected, you to allow me full general agent's commission as per your contract.

And in consideration of said full general agent's commission I agree to turn over my good will and interests in all renewals after the first year, and agree not to collect said business in the future for this or any other company."

This was signed by Brown and accepted by Power.

Pursuant to this contract Brown turned over a considerable amount of business to Power and received from Power a con-

siderable amount by way of commissions on premiums. It is stipulated in the record that the amount of commissions provided for in this contract for the first year, which Brown would be entitled to in case he has not forfeited his right by reason of facts hereinafter to be stated, is \$786.11, with interest from October 27, 1899.

It is further stipulated that Brown, after the making of the contract between himself and Power, became the agent of the Maryland Casualty Company, and as such agent solicited and secured quite a number of natural persons and corporations to take out policies of insurance in said last named company who had been insured in the company which Brown represented at the time he made his contract with Power, and who, through his influence, had turned over their insurance to the company represented by Power.

The defense set up is that this conduct of Brown in thus soliciting and securing parties to insure with him in the Maryland Company was such a violation of the contract entered into between him and Power as to bar him from any recovery and to entitle Power to recover back the commissions which he had already paid to Brown.

On the other hand, the claim is made that the contract was a divisible one; that Brown for one single consideration undertook to do two separate things; that he did one of these two things, to-wit, in the language of the contract, used his best efforts in placing the business of insurance which he then had with the company represented by Power; that the other thing which Brown undertook to do, to-wit, turn over his good will and interests in all renewals after the first year and not to solicit said business in the future for any other company, he failed to do; that this failure to do the two things is not a defense to the claim made for doing the first thing, but is only a ground for damages to be asserted by Brown and available in this action only as a counter-claim to whatever claim Brown has for doing the first thing, to-wit, the \$786.11. This latter view was taken by the trial court and the jury were charged accordingly, and properly charged if this view of the case is correct.

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There remains, therefore, the question of whether this contract is to be treated as an entirety or as divisible. We hold that it is divisible. When Brown used his best efforts to place the business which he had with the company represented by Power, he did the first thing which he undertook to do.

Suppose that he had done nothing in violation of any stipulation of his contract until the expiration of one year from its date after having turned over the business, so far as he was able, to Power—could it be doubted that he would then have been entitled to the commissions for that one year which are provided for in the contract; and that if thereafter he had solicited the same business for his Maryland Company Power would have been remitted to his claim for damages because of such actions on the part of Brown? The time for which Brown contracted that he would not solicit such business was unlimited, and it would seem that it must have been in the contemplation of the parties that if Brown violated his contract by soliciting said business in the future he was to be liable in damages to Power. If this is correct, we are unable to see that his violating the contract in this manner before the expiration of the year gave Power any remedy against him which he would not have had if the violation had taken place after the expiration of the year.

The case of *Burckhardt v. Burckhardt*, 36 O. S., 261, is in point. That was a suit brought by one who had sold the property and good will to his partner in the business of the co-partnership. By the contract the plaintiff, among other things, agreed that he (the plaintiff) would not thereafter do business by or under the name of Burckhardt & Co., which was the name of the co-partnership between the parties, in the city of Cincinnati. Immediately after the execution of the contract the plaintiff *did* enter into business in Cincinnati under the name and style of L. Burckhardt & Co. In purchasing the property the defendant had given to the plaintiff his promissory notes secured by a mortgage. The suit was for a foreclosure of this mortgage. The defendant, for answer, set up that the plaintiff, having violated his contract, was not entitled to any payment upon the notes and mortgage. The court held that this was not a defense to the action, but that if the plaintiff had violated his

contract such violation could only be made available to the defendant as a counter-claim, and on page 280 uses this language:

“The counter-claim to which the defendant was entitled was one for damages only. There was no failure of consideration, in the proper sense of the term, which could be available as a mere defense.”

The case of *Courcier & Ravises v. Thomas Graham*, 1 Ohio, 330, is also in point. The opinion, which is by Judge Hitchcock, is exhaustive, and the reasoning is sound. In this opinion there is a complete discussion of the matter of *mutual and independent covenants* in the contract. Many cases are cited in the opinion in support of the views expressed, and we think the case fully justifies the view of the case now under consideration taken by the court below.

If the contention of the defendant here is sound, then Brown was entitled to nothing for the business which he had transferred to Power, because, after transferring it, he solicited and obtained for the Maryland Company a comparatively small part of the business which Power got from him or by his efforts. Before this suit was brought Brown had received a considerable amount by way of commissions on this business, and, as before stated, was still entitled to more than \$800 on account of such commissions, except for the fact that by his solicitation, in violation of his agreement, he had obtained some of it for his new company, and not only should he be barred of a recovery here but he should be adjudged to repay to Power all that he (Brown) had already received; and yet the amount of business that he had taken from Power was but a small part of that which Power had received from him, and it would seem, upon principles of justice between the parties, that Power's only right should be compensation in damages for the amount of business so diverted from his agency to that of Brown.

Complaint is made that the court erred in its charge to the jury on the measure of damages to be allowed to Power. The court used this language in the charge, speaking of the measure of such damages:

“The amount of such injury or loss, if any, which you find that the defendant thereby sustained, will be the measure of the

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damages which the defendant is entitled to recover on his counter-claim and cross-petition, in case you find for him thereon. In arriving at the amount of such damages, if any, you may consider in connection with the other facts and circumstances in the case as found by you the amount of commission received by the plaintiff upon the premiums for policies of insurance solicited and obtained by him from persons whose policies had been transferred to the Travellers Insurance Company by or through the instrumentality of the plaintiff, and it is for you to say from the testimony whether the commissions on such premiums would otherwise have been received by the defendant. Although you may not be able to determine accurately the amount of damages, if any were sustained by the defendant, yet if from all the testimony you are able to estimate with reasonable probability the amount of such damages, you may thus estimate the same."

This would seem to be a fair statement of the means for determining the measure of the defendant's damages, and perhaps would not be complained of but for what follows, in these words:

"If from all the testimony and the facts and circumstances of this case you are unable either to find or to estimate with reasonable probability the amount of damages, if any, sustained by the defendant, then the defendant would be entitled to recover only nominal damages, that is, five or six cents, or some other small sum."

Whether this last quotation properly stated the law or not, it is manifest from the verdict in the case that it did not affect the verdict of the jury. If that verdict had allowed to the defendant only nominal damages we should be called upon to determine whether this language was erroneous or not, but in view of the fact that the jury found that they could determine, and did determine the amount of the defendant's damages to be nearly \$200, it is clear that this part of the charge did not affect the verdict.

The judgment of the court of common pleas is, therefore, affirmed.

Hoyt, Dustin & Kelley, for plaintiff in error.

Kline, Carr, Tolles & Goff, for defendant in error.

CONTRIBUTORY AND CONTINUING NEGLIGENCE.

[Circuit Court of Lucas County.]

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY v.
WILLIAM CALLAHAN.

Decided, June 20, 1903.

Negligence—On the Part of a Section Hand—Injured by a Backing Locomotive—Contributory Negligence and Continuing Negligence—Answers to Interrogatories Inconsistent With Verdict.

1. Where a railroad section hand, in obedience to a direction by his foreman, starts to walk along the track with his back to a locomotive two or three hundred feet away, but without observing whether the engine is backing toward him or standing still, and walks along the track for seventy-five feet without paying any further regard to the engine, which is in fact backing toward him and is struck by it and injured, he is guilty of contributory negligence.
2. In a case where the negligence of the one injured is concurrent and continuing to the moment of the injury, the doctrine of the "last chance" does not apply, and he can not recover notwithstanding there may have been negligence upon the part of his foreman or those upon the engine in failing to warn, or use other possible means to save him from his peril.

HULL, J.; PARKER, J., and HAYNES, J., concur.

This proceeding in error was brought to reverse the judgment of the court of common pleas. The defendant in error, who was the plaintiff below, brought his action against the railway company to recover damages for personal injuries, which he claims he sustained on the 21st day of January, 1901, on account of and through the negligence of the railway company. He was awarded a verdict of \$1,500 by the general verdict of the jury; and there were special findings of the jury made in answer to interrogatories at the request of both plaintiff and defendant below.

A motion was made by the railway company after the verdict for a judgment in its favor, notwithstanding the general verdict against it. The motion was overruled by the court below and judgment entered against the railway company for the

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amount of the verdict, \$1,500; and it is to reverse this judgment that the petition in error was filed in this court.

It is claimed that the plaintiff in error is entitled to a judgment in its favor in this court upon the special finding of the jury, as well as a reversal of the judgment of the court below. And the only point urged here by the plaintiff in error is this one—that upon the special findings of the jury it was entitled to a judgment, notwithstanding the general verdict, and that it should have a judgment entered in its favor here.

The plaintiff, and when I say plaintiff, I mean the plaintiff below, William Callahan, was a section man in the employ of the railway company on the day of his injury, and was working under the direction of one John Rable, who was acting as foreman, nearly opposite the union depot in the city of Toledo and almost directly opposite the dining-room which is connected with the union station. Callahan and the other men in his gang were at work repairing the track at this point, a portion of the east-bound main track, which lies outside of and to the south of the sheds under which the passenger trains ordinarily run. They were at work there repairing the track, and in doing their work it became necessary to have a wrench and bolt which were lying between the rails of this track, about seventy-five feet eastward of where they were at work, and Callahan was directed by Rable, his foreman, to go and get this wrench and bolt, and he started eastward for that purpose.

Shortly before this a passenger train had come in from Cleveland, which was due in Toledo at the station at 2:10 p. m. The engine had been unhitched from the train for the purpose of taking it to the coal dock or to the round house, and it had been run west about a quarter of a mile to what is known as the Broadway bridge, and was there switched and thrown upon this east-bound main track where these men were at work, and from this point, near the Broadway bridge, was then backed eastward, starting about a quarter of a mile west of where Callahan was at work, the track being clear and straight.

Callahan, when he started after the wrench and bolt, walked down the east-bound main track between the rails; as he started to walk between the rails he looked west, he says, and saw this

locomotive, which was there, with its rear end toward him; he says it was some two or three hundred feet distant, and he thought it was standing still. Other witnesses place it as near as seventy-five or one hundred feet. He proceeded eastward along the east-bound main track, without looking further for the locomotive or making any further attempt to ascertain whether it was moving or not. When he reached the place where the wrench and bolt were, according to his testimony, he stooped over to pick them up, and just as he was in the act of stooping, with his back toward the locomotive, the rear end of the locomotive struck him, and he was thrown under the rear of the tender and dragged or propelled about one hundred and forty-seven feet, and sustained injuries; three fingers of one hand were cut off and he was otherwise injured about his person.

He claims that he heard no signal, either by bell or whistle, and did not hear the locomotive approaching, and he says he thought the locomotive was standing still when he started down the track, and that he did not know that it would start. And it is further claimed by him that it had been the custom for the foreman of such a gang to warn the men by calling out upon the approach of a train; and that he supposed, if a train approached from the rear while he was going down the track, he would be given such warning. He claims further that no such warning was given by the foreman then in charge, or, if one was given, he did not hear it.

It is also claimed that a man should have been placed upon the rear of the engine to notify men upon the track. However, this is not especially relied upon. But the grounds of negligence generally set up in the petition are that no bell was rung on this locomotive, or whistle blown; that the foreman in charge of the men did not keep a lookout for approaching trains or locomotives, and did not warn Callahan as he walked down the track; and that the engineer and foreman upon the locomotive were negligent in not keeping a proper lookout for men upon the track, and in not stopping so as to prevent injuring Callahan after they discovered he was upon the track, or might have discovered him by due care, the claim being that by the exercise of ordinary care the engineer might have discovered Callahan upon

the track in time to have stopped the locomotive and avoided injuring him.

The fireman and engineer both testified that they did not see Callahan upon the track. The testimony of the engineer is, and it seems to be uncontradicted, that it would not be possible for him to see a man on the track from the engine nearer than 135 or 140 feet from the tender, on account of the view being obstructed by portions of the locomotive. And it is not claimed here that either the fireman or the engineer saw Callahan upon the track; at least there is no evidence that they did. It is claimed, however, that, by the exercise of ordinary care they might have seen him. But it is not claimed that he was injured through any wanton or willful act of the engineer or fireman, or any reckless act; but the claim of the plaintiff is based upon the alleged negligence on the part of the engineer and fireman in not seeing him and in not giving a signal, and the failure to give warning by the foreman, as has been stated.

Any extended review of the evidence is unnecessary, on account of the special findings of the jury. The court, at the request of the railway company, submitted to the jury four interrogatories, which were answered. They are as follows, with the answers:

"1. After engine 146 came out upon the east-bound main track and began to back easterly, did it stop so backing until after it struck Callahan?" Ans. "No."

"2. Was the bell upon engine 146 ringing as it was backing east on the east-bound main track, as and when Callahan was struck?" Ans. "Yes."

"3. Did Engineer Sawyer, whilst backing his engine on the east-bound main track, and as and when Callahan was struck, exercise ordinary care in keeping a careful lookout in the direction in which his engine was backing?" Ans. "No."

"4. Before Callahan started to walk east upon or at the side of the east-bound main track could he, by the exercise of ordinary care, have observed this engine a short distance westerly of him, moving towards him upon the east-bound main track?" Ans. "Yes."

"6. After Callahan started to walk east upon or at the side of the east-bound main track, did Rable, the other section man, call out to him to 'watch out' in time and in such manner that

by the exercise of ordinary care he would have heard the warning and avoided the injury?" Ans. "No."

And upon the request of the plaintiff below, two interrogatories were submitted to the jury, which were answered. They are as follows:

"2. When Callahan started to walk east upon the track, did he exercise reasonable and ordinary care for his own safety up to the time the engine struck him, considering that it was customary to ring the bell of a coming engine and for the foreman over him to call out a warning of its approach?" Ans. "Yes."

"4. Could the engineer of the engine, by exercising reasonable and ordinary care, have stopped the engine in time to avoid injuring Callahan after he knew, or should have known of Callahan's danger by the exercise of ordinary care?" Ans. "Yes."

Counsel for the plaintiff in error claims that upon the answers to interrogatories numbered two and four, submitted by the railway company, the railway company is entitled to a judgment in its favor, notwithstanding the general verdict and also not withstanding the answers to the other interrogatories submitted by both the plaintiff below and by the defendant below.

It is claimed by the defendant in error, taking into consideration all the interrogatories which were answered by the jury, which might be said to constitute a special verdict, or that they are in the nature of a special verdict, that the judgment of the court below should be affirmed, and its action in refusing to enter judgment in favor of the railroad company should be affirmed.

Defendant's interrogatory No. 2, with the answer, has been read, but I will read it again:

"2. Was the bell upon engine 146 ringing as it was backing east on the east-bound main track, as and when Callahan was struck?" Ans. "Yes."

So, upon this special finding of the jury, which is sustained by the evidence in the case, the question as to whether the bell upon the locomotive was being rung as the locomotive approached Callahan is settled and all doubt is removed, the jury finding specially that it was rung, and Callahan must be judged and his

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rights determined upon the hypothesis that the bell was in fact ringing when he started upon the track eastward and while he was walking upon the track and until he was struck by the locomotive.

Interrogatory No. 4 and the answer thereto I will read again, as this is the remaining one upon which the plaintiff in error relies

"4. Before Callahan started to walk east upon or at the side of the east-bound main track could he, by the exercise of ordinary care, have observed this engine a short distance westerly of him, moving towards him upon the east-bound main track?"
Ans. "Yes."

This special finding of the jury is sustained by the evidence, and it is established then that at the time Callahan started to walk eastward upon the track, he could, by the exercise of ordinary care, have observed this engine. In fact, he testified that he did see the engine when he started east upon the track, some two or three hundred feet westward of him, but he thought it was standing still. The finding of the jury, however, is, by the answer to interrogatory No. 4, "Yes," to-wit, that "he could, by the exercise of ordinary care, have observed this engine a short distance westerly of him, moving towards him upon the east-bound main track." We understand that to mean that the jury finds that by the exercise of ordinary care he could have observed that the engine was moving toward him upon the east-bound main track when he started to walk easterly. If there is any question about that, we hold, as a matter of law, that when he saw the locomotive upon the east-bound main track not more than two or three hundred feet distant from him when he started, that it was his duty to look carefully enough to ascertain whether the locomotive was moving or standing still. When he turned his back upon this locomotive, there was imposed upon him at least the same duty that is imposed upon the traveler who is about to cross a railway track; that is, the duty of using his senses, by looking and listening to ascertain whether a train or a locomotive is approaching, and if the circumstances are such, as have been laid down by the Supreme Court of this state many times, that by looking and listening, and in the exer-

cise of ordinary care, he might have seen or heard the train, and he is injured, on account of not seeing or hearing it, he can not recover for the reason that he must be held, as a matter of law, to be guilty of contributory negligence; and we think it is not going beyond the law to say that if a man sees a locomotive upon the track within two or three hundred feet of him, it is his duty, as a matter of law, to look carefully and ascertain whether the locomotive is moving or standing still.

Under this special finding of the jury and upon the admitted facts, it appears that when plaintiff turned eastward upon this track he saw this locomotive not more than two or three hundred feet away moving toward him, and, under finding No. 2 of the jury, that the bell upon the locomotive was ringing at the time.

It is claimed by the plaintiff in error that under this state of facts, Callahan was guilty, as a matter of law, of negligence contributing directly to his injury, at the time of his injury.

Upon the other hand it is claimed by the defendant in error that notwithstanding these facts, the railway company was liable on account of the negligence of the engineer and fireman in not observing Callahan upon the track; and that they were bound to use ordinary care to observe him, and the jury having found that the engineer might have seen him by the exercise of ordinary care, that therefore the railroad company is liable, notwithstanding the contributory negligence of Callahan; that the case, as stated, comes within the doctrine of the "last chance," as it is called by some authorities; that is, when a party, by his own negligence, has put himself in a place of danger, the party charged with injuring him is liable if, by the exercise of ordinary care, he might have avoided injuring him after he discovered the other party was so in a place of danger, and that the party would be liable under such circumstances, if he did not exercise ordinary care, although the party injured was negligent or had been negligent in getting himself into such a place of danger.

It has been decided by the Supreme Court of this state and by other courts that, although a party has placed himself in a dangerous position, by reason of his own negligence, that he

may still recover against another person, who, having discovered his situation, does not use ordinary care to prevent injuring him, the doctrine being, that although a man, by his own negligence, has placed himself in such a position, he can not be injured with impunity; that he is still entitled to the protection of the law; and any one who discovers him in such a situation is bound to exercise ordinary care toward him. This doctrine was laid down by the Supreme Court of this state in the case of *Railway Co. v. Kassen*, 49 Ohio St., 230, where a man on an excursion train running along at night near Hamilton, Ohio, walked off the back end of the train and fell on the track, and on account of his injury was rendered unconscious. The train passed on without any effort to protect the man, or without stopping to pick him up, and failed to send any telegram from the next station to the following train which came along in about an hour and ran over the man and killed him. The Supreme Court held in that case that although, by his own negligence, deceased had placed himself in such a situation of peril, he was, notwithstanding that, entitled to have exercised toward him ordinary care for his protection. The court say in the first paragraph of the syllabus:

"1. It is a well settled rule of the law of negligence, that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured."

And the court say in the opinion, on page 239, quoting from the case of *Kerwhacker v. Railway Co.*, 3 Ohio St., 172:

" 'When the negligence of the defendant, in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.' And such is the well settled law. The negligence of the plaintiff's intestate, in stepping or falling from a train while moving at a high rate of speed, was only the remote, and not the proximate cause of his death, the proximate cause being the omission of the defendant to use proper care, after having become aware of the danger to which his negligent act had exposed him."

But we think it is well settled that where the negligence of the party injured is continuous and is, in fact, continuing up to, during and at the very time of his injury, and if such negligence contributes directly to his injury, he can not recover on account of negligence of another.

It is needless to cite authorities to sustain the general proposition that where one's own negligence directly contributes to his injury, he can not recover on account of the negligence of another, for the law will not undertake to apportion the degree of negligence as between the parties. As was said by the Supreme Court in the case of *Schweinfurth v. Railway Co.*, 60 Ohio St., 215, in the second paragraph of the syllabus:

"In an action for negligence, it is not error to refuse an instruction that the defendant can not be held liable though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or was a proximate cause of the injury, it does not preclude a recovery."

And this proposition is discussed at length and authorities cited in the opinion. It was held that the request to charge was defective for the reason that it did not contain the language that the negligence complained of must have contributed *directly* to the injury. But if the negligence of the person injured is concurrent with the alleged negligence of the party charged with doing the injury, we hold the law to be that he can not recover, and we find no authority contrary to that doctrine.

In this case we think that the negligence of Callahan did contribute directly to his own injury, and it continued during all the time he walked upon the track, up to, during and at the very time that he was injured by the locomotive. He was bound by the law of this state and the general law of the land to keep a lookout for this locomotive, which he knew was upon the track, and which we find he knew, or by the exercise of ordinary care would have known, was approaching toward him. He therefore went upon the track and turned his back upon a locomotive approaching from behind him, with the bell ringing, and continued to walk upon the track without making any

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effort whatever to ascertain how near this locomotive was approaching to him. He says he relied upon the foreman to give a warning to him, if the locomotive approached near enough to threaten him with danger.

We are of the opinion that he could not rely upon that; that the fact that it may have been the custom for the foreman to give warning by calling out did not relieve him of his duty to exercise ordinary care in looking out for the locomotive, any more than it excuses a traveler upon the highway, when he approaches a crossing, from looking and listening, because a signal by bell or whistle is not given. That has been held many times by our Supreme Court. Seeing this locomotive approaching, he knew he was in a place of danger when he was walking upon the track. He was not required to walk between the rails; he might have walked upon the other track, or at the side of the track. And there can be no question but that it was his duty to keep a constant and vigilant lookout for this locomotive approaching from behind him; and no other view would properly protect human life. Such a rule is necessary for the protection of men who are in the habit of going into dangerous places, and the law requires the exercise of such vigilance under such circumstances; and this is required also for the protection of the lives of the men operating the trains, and for the protection of passengers on the trains. The case of *Baltimore & O. Ry. Co. v. Depew*, 40 Ohio St., 121, was a case where a party had arranged with a railroad company for the transportation of himself, his family and his household goods to some western point. He was at or about the station when a train upon the railroad track started down the track; the train had been standing still. He relied upon the men operating the train giving him a warning by some signal, either by bell or whistle, when it started. They did not, and the train ran upon him and injured him. He kept no lookout for the train, to see whether it was approaching him or not. And the Supreme Court held he could not recover. They say in the syllabus:

“Where a locomotive with cars attached is standing on a railroad track near a railroad station or other place where cars are frequently moved forward or backward, a person who goes upon

the railroad track, seeing the locomotive and cars, and knowing that they would, within a few minutes, be moved toward him, and walks upon the track away from the train without watch of its movements, where there was nothing to hinder him from seeing the movements of the train in time to avoid danger, and when he could have gone in the same direction without walking on the track, is guilty of such negligence as will prevent his recovery for an injury caused by the carelessness or unskillfulness of the employes of the railroad, not amounting to willfulness on their part.

"A person so walking upon a railroad track is not free from negligence which will prevent his recovery for an injury so caused if he omits to keep watch of the movements of the train, relying upon a rule or custom of the employes of the railroad to give a signal for the moving of the train.

"The expectation that such signal would be given does not relieve a person, in such situation, from constant watchfulness for his safety."

The opinion in this case was delivered for the court by Judge McCauley. On page 127 of the opinion, the court say:

"The plaintiff knowing that the train would soon move backward, went upon the track at a station a few yards in the rear of the train, and thence walked from the train, and did not take the care to look around or in any way keep a lookout for its movements until the backing cars struck him, and this, when there was nothing to hinder him from turning around, and nothing to prevent him from plainly seeing the train if he had looked for it."

As I have said, the foreman testifies that he did call out to Callahan to warn him of the approaching locomotive. Rable testifies that he was at work upon the track, and after Callahan started to walk on the track he saw the locomotive coming along; that he stepped off the track to let it pass by and that he called out to Callahan to "watch out" or "look out," but Callahan testified that he did not hear him; and the finding of the jury in answer to one of the interrogatories submitted by the plaintiff below indicates that they found that either Rable did not call out, or that he did not call out loud enough for Callahan to hear him.

I have discussed this proposition upon the theory that Rable did not give the warning. And we are of the opinion that this

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would not excuse plaintiff; that although it had been the custom to call out, and although he heard no warning given by the foreman, he could not, under the law, rely upon that to such an extent as to relieve him of the duty of keeping a lookout himself when he was walking down the track. As has been said, the testimony of Rable is that he did, in fact, call out to him, but there is a question as to whether he called out loud enough for Callahan to hear him. But the jury found that the bell was ringing as the engine approached Callahan.

Upon the question as to whether a party can recover where his negligence is concurrent with that of the party charged, a decision of the Circuit Court of Appeals of the United States, the opinion rendered by Justice Day, now of the Supreme Court of the United States, is directly in point. It is the case of *Gilbert v. Railway Co.*, 13 O. F. D., 475, 482. It is said in the second paragraph of the syllabus:

"The rule that where the plaintiff, in an action for personal injuries, who places himself in a dangerous position, and from which an injury is likely to result, may recover therefor if the defendant, with full knowledge or such notice as is equivalent to knowledge thereof, fails to exercise reasonable care, by which the injury may have been avoided, has no application to a case where the injury is the result of the concurrent negligence of both parties."

We think it is clear in the case at bar, if the railroad company was negligent, through the engineer and fireman, that this injury happened as the result of the concurrent negligence of both parties; that Callahan was himself guilty of negligence contributing directly to his injury, up to and at the very time that the injury occurred. He made no effort to ascertain whether this locomotive was approaching; he kept no lookout whatever while walking upon the track, or when he bent over to pick up the tools; and that therefore he was negligent during all of the time after he started to walk down the track until he was in fact injured.

After reviewing the authorities at length and citing some federal decisions, some of them decisions of the Supreme Court of the United States, Judge Day concludes:

“As we understand the rule to be deduced from these authorities, it amounts to this: That where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, the defendant, with knowledge, or such notice as is equivalent thereto, of the plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring the plaintiff; and where, by the exercise of such care he could do so, fails to avoid the injury, this negligence introduces a new element into the case, and renders the defendant liable, because such negligence becomes the direct and proximate cause of the injury. We do not think the principle settled in these cases applies to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant. There is no averment in the petition that the engineer or fireman saw the decedent upon the track, or in a place of imminent danger, in time to have avoided the injury. Taking the allegations of the petition together, it seems to us to be a case of concurrent negligence on the part of the decedent and the railway company. Assuming it to be true that the defendant was guilty of the negligence charged in the petition, the deceased was guilty of negligence which directly contributed to the injury. In this view of the case, we do not think it is brought within the principle laid down in *Baltimore & O. Ry. Co. v. Hellenenthal*, 88 Fed. Rep., 116, and similar cases. As the petition fails to disclose a cause of action in favor of the plaintiff, the demurrer was properly sustained, and the judgment of the court below is affirmed.”

This was a crossing case where a man was injured while crossing the railroad track. In a very recent case in the Circuit Court of Cuyahoga County, in the opinion delivered by Judge Caldwell, he cites and reviews many authorities and decisions of our Supreme Court. This is the case of *Cleveland, C., C. & St. L. Ry. Co. v. Gahan*, 1 Circuit Court—New Series, 205. The second paragraph of the syllabus is as follows:

“The rule that in case of injury by negligence, where the parties are mutually in fault, the plaintiff may recover if the negligence of the defendant is the proximate cause of the injury while his own negligence is only the remote cause, consisting of some act or omission not occurring at the time of the injury, does not apply where the negligence of each party was the same in character, time and duration and equally active in causing the injury.”

On page 286 of the opinion, after reviewing the authorities, Judge Caldwell says:

“The rule, as established by the courts, and in cases heretofore referred to, is in cases where the plaintiff has, at some time prior to the negligent act of the defendant, been guilty of negligence, and the rule is on the ground that the two acts of negligence did not co-operate; that the plaintiff’s negligence created only a condition or circumstance upon which the defendant’s negligence thereafter acted; and where that is true the defendant’s negligence is the proximate cause, or, as expressed by some courts, the ‘last chance.’ In citing the foregoing authorities upon this proposition, it has not been the purpose to establish when the rule applies, beyond this fact, that it applies only when the plaintiff’s negligence in this case was not prior to, but co-operated with, that of the defendant.

“This rule does not apply where the plaintiff may have been negligent in not looking for danger from an approaching train upon the track, when it would have been possible for him to have stepped from the track, had he thus looked. Nor will it apply where he stands so close to the track without looking for approaching danger, that he is struck by a rapidly moving train. For, in these cases, his negligence, which co-operates at the same time with the defendant’s negligence, is his standing on the track without any effort to see approaching danger or without effort to move from his position, which is a continuing negligence, until he is struck. In such cases he can not complain.”

In the case of *Lake Shore & M. S. Ry. Co. v. Schade*, 15 C. C., 424, which has been so often referred to and sometimes criticised, and which was affirmed by the Supreme Court without report, this principle of law laid down by Judge Caldwell in *Cleveland, C., C. & St. L. Ry. Co. v. Gahan*, *supra*, and laid down by the Supreme Court in the case of *Railway Co. v. Kassen*, 49 Ohio St., 230, was applied to the facts in *that* case, and the charge of the court to the jury was apparently based upon the theory that the negligence of the party injured might not have been concurrent with that of the other party. An abstract of the charge to the jury is found in the opinion, on pages 320, 321, as follows:

“ ‘One of the charges of negligence in this case is that while George Kirkhope, the deceased, was upon the track in a place of

danger from the approaching engine, the engineer or persons in charge of this train could have seen him, and at least have checked the speed of the engine so as to permit him to pass on in safety. We say to you, if by the exercise of ordinary care on the part of the engineer he could have seen the decedent, George Kirkhope, upon the track, and the dangerous position he was in, and by the exercise of ordinary care could have stopped his engine in time, or checked its speed so as to have permitted him to escape from this dangerous place, and saved his life, it was his duty to exercise that care.' * * *

“‘Failure to do it would be negligence, which would permit recovery in this case, although George Kirkhope may have been guilty of negligence in going upon the track and being in that position. That is, upon the rule that where a person sees another in a position of danger, no matter how such person came there, if by the exercise of ordinary care he could save such person from injury, it is his duty to do so, and the failure to exercise such care is negligence.’”

The question in this case was whether this proposition of law was applicable to the facts in the case. Judge Hale dissented. He says, in his dissenting opinion, on page 324:

“‘The charge as given I have no sort of disposition or desire in any shape to criticise. Every dictate of humanity, every reason that could be suggested, would sustain the decision rendered in the case here cited in *Railway Co. v. Kassen*, 49 Ohio St., 230. It was clearly right. The only doubt that remains in my mind is whether the principles there announced should be applied to a case of this kind.’”

We hold in the case at bar that the principles announced in the case of *Railway Co. v. Kassen*, 49 Ohio St., 230, are not applicable to the facts in this case; that here is a case of concurrent negligence, the negligence of Callahan being concurrent with that of the railway company, if the railway company was in fact guilty of negligence.

We do not think any case has been cited by counsel for defendant in error that conflicts with the views here expressed. The case of *Snyder v. Railway Co.*, 60 Ohio St., 487, is where a man was working upon the track, engaged at his work of unloading a car, a train came along without giving any signal and he was injured. In the case of *Lake Shore & M. S. Ry. Co. v. Murphy*, 50 Ohio St., 135, a man was engaged in work upon

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the track, bending over; a train came along, and without any signal, ran into him, and he was killed, and the Supreme Court held it was a fair question for the jury as to whether there should have been a rule requiring the railway company to have a man there to give warning of approaching trains.

In an unreported case decided by the Supreme Court on June 9, 1903 (*Lake Shore & M. S. Ry. Co. v. Ham*, 48 Bull., 545), men were at work upon the track at or near Pettisville, Fulton county, about four miles from Wauseon. The decedent went down the track to get some tools of some kind; he was walking on the track; a train was about a half a mile away when he started; when about 247 feet from the point he started he was struck by the train and killed. It was claimed that he was not guilty of contributory negligence because he had a right to rely upon a warning being given to him; that the foreman did not give him any warning; that he did not see the train when he started to walk upon the track. The Supreme Court held that the court of common pleas was justified in directing the jury to return a verdict in favor of the defendant and affirmed the judgment of that court and reversed this court.

It is unnecessary to discuss the answers of the jury to the interrogatories propounded on behalf of the plaintiff below. We hold that notwithstanding the fact that the jury found that the engineer and fireman could have discovered plaintiff by the exercise of ordinary care, he can not recover on account of his own contributory negligence. We hold that the answer of the jury that Callahan exercised ordinary care in walking down this track is not sustained by the evidence, and that as a matter of law he was guilty of contributory negligence in not keeping a lookout for the locomotive, as has been already stated.

We therefore hold, under these special findings of the jury, which in fact found Callahan, under the law, as we understand it, guilty of negligence which contributed directly to his own injury, negligence concurrent with that of the railway company, if it was guilty of negligence, that plaintiff can not recover. And the court of common pleas therefore erred in overruling the motion of the railway company for a judgment upon the special findings of the jury.

The judgment of the court of common pleas must be reversed and judgment entered here in favor of the railway company.

I will say further that we are of the opinion that the finding of the jury that the engineer could have discovered Callahan, by the exercise of ordinary care, is not sustained by the evidence. The evidence does not establish the fact that the engineer or fireman were negligent. There is no evidence that either one of them saw Callahan. The evidence is that the engineer could have seen Callahan when he was within 135 or 140 feet of the engine. Men were at work upon these tracks all the time, repairing the track; they remained on the track until the train was just a little way off—very near to them; and the fact that the section men were upon the track and that Callahan was ahead of the locomotive was no notice to the engineer that he would remain upon the track until the locomotive struck him. The testimony of Rable shows that he remained upon this track, although he saw this locomotive coming, he remained at work upon the track until it was very close to him, when he stepped off and let it pass by.

In view of these facts, in view of the situation and the known custom for the men to remain upon the tracks where they were at work until the locomotive was very close to them, and the fact that there is no evidence that either the fireman or engineer saw Callahan walking down the track, we are of the opinion that this finding of the jury, in answer to interrogatory No. 4 submitted by the plaintiff below, is not sustained by the evidence; that is, the affirmative answer to this question, "Could the engineer of the engine, by exercising reasonable and ordinary care, have stopped the engine in time to avoid injuring Callahan, after he knew, or should have known of Callahan's danger, by the exercise of ordinary care?" The testimony is that both the engineer and fireman were looking out of the cab window and neither saw him.

But aside from the question of negligence on the part of the railway company, we hold, for the reasons stated, that judgment should be entered upon the special findings of the jury in favor of the railway company in this court, and the judgment of the court of common pleas reversed.

LEDGER ENTRIES COMPETENT EVIDENCE.

[Circuit Court of Lorain County.]

MARY W. BURR v. R. H. SHUTE.

Decided, October, 12, 1902.

Book Accounts—Those of Original Entry Destroyed—Correctly Posted Ledger Then Competent—Motion for a New Trial—Evenly Balanced Testimony.

1. Where a day book or memorandum book of original entries has been destroyed, and there is proof that the entries were correctly transferred to the ledger, such ledger is competent evidence as to an account contained therein.
2. In a case where the evidence is so evenly balanced that a reviewing court would hesitate to disturb a verdict were it returned for either party, it is not error to overrule a motion for a new trial, asked on the ground that the verdict was against the weight of the evidence.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

The case of Burr v. Shute, error to the court of common pleas. The defendant in error, Shute, obtained a judgment against the plaintiff in error in the court of common pleas for a small amount, for goods sold and delivered to the plaintiff by the defendant.

The case was first tried before the justice of the peace, and an attempted appeal to the common pleas court by the defendant in error, the judgment of the justice of the peace being in favor of the plaintiff in error.

The first error assigned is that there was really no judgment in the justice court, and, therefore, nothing to sustain an appeal. We intimated to counsel on the hearing that we thought that judgment was good, and we have no doubt that the judgment, although irregular, was sufficient to determine the rights of the parties.

And second, that the court erred in admitting a certain book in evidence.

Shute owns a meat market, and the cause of action stated in the petition was on an account for meat sold by the defendant in error to plaintiff in error.

The book offered was a ledger. Some of the meat was sold from a meat wagon that was driven about the country by an agent of Shute, who made memorandums of the sales in a little book which he returned to the shop. Some of the meat was sold from the shop, if we believe the defendant in error's statement, and that was charged in a day book. Both of those books of original entry were posted by the book-keeper, Boynton, into the ledger. It is shown in evidence that these two books of original entries are destroyed.

The proof is, that the transcript from these books to the ledger was correctly made, both as to the property sold and the amount and the price.

We see no reason why the book was not competent. If the books of original entry were destroyed, and there was a correct copy of them, such copy was proper evidence.

And secondly it is said the verdict of the jury was not sustained by sufficient evidence.

There was evidence tending to show that there was dealing between the plaintiff and defendant, and tending to establish the claim of the defendant in error. It was sharply met by testimony and evidence on the part of the plaintiff in error; but the evidence is not such as would authorize a reviewing court to reverse the judgment of the lower court on the weight of the evidence.

Had the verdict been for either party we would not disturb it. That is saying that the court did not err in refusing the motion for a new trial because the verdict was not supported by sufficient evidence, and the judgment will be affirmed.

I. A. Webster, for plaintiff in error.

F. Rudin, for defendant in error.

**QUESTIONS OF NEGLIGENCE WHERE REPAIRER WAS INJURED
BY THE TILTING OF A CAR.**

[Circuit Court of Lucas County.]

**ANNA S. KRACHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM
F. KRACHT, DECEASED, v. THE LAKE SHORE & MICHIGAN
SOUTHERN RAILWAY COMPANY.**

Decided, October 10, 1903.

*Negligence—Where a Car Repairer was Fatally Hurt—By the Tilting
of a Car Under which he was at Work—Circumstances of Injury—
Constitute Issues of Fact Rather than of Law—Master and Serv-
ant—Railways.*

1. The master is bound to use ordinary care to provide a reasonably safe place for his servants to work, and to establish reasonable rules or regulations whereby the servant may be guarded and protected against danger and injury incident to the performance of his duties. Hence, where a servant is ordered, either by general or special direction, by the foreman of his department to repair a car, in which work it is necessary to raise the same and place it on supports for the purpose of removing the trucks, and while engaged in such repair it is necessary for the servant, along with others, to work underneath the car as thus raised, and sit upon the ground at one end thereof with his eyes directed to the floor of the car above him in order to see what he is doing, and while he is so at work other servants are also engaged in the same work at the other end of the car, and in the course of making the repairs it becomes necessary to have such other end of the car raised and the supports thereunder taken out, and while engaged in his work in such position the servant could not see and did not know what was going on at such end, the master is charged with knowledge of the dangerous situation and the known and apparent danger to the servants by the raising and falling of the car, and it is a question for the jury whether or not it is the master's duty, while such work is going on, to have some one from under the car, or provide some other method, to give timely notice or warning to the workmen under the car that the same was about to be raised. In such case the master may be liable for the injuries sustained by the servant by reason of the car falling upon him, notwithstanding the combined negligence of fellow servants in raising the car.
2. It was not negligence as a matter of law for a servant, who was experienced in such car repairing, to remain at his work under the

car unless he had notice that the car was about to be raised; but where there was a conflict in the evidence as to such notice, the question as to whether or not the servant was negligent and the question as to the duty of the master under the circumstances to make rules or other provisions for giving notice or warning of what was about to be done by the workmen at the other end of the car should have been submitted to the jury; and it was improper for the court to take the case from the jury and direct a verdict for the defendant.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought in the court of common pleas by the plaintiff in error, who was plaintiff in the court below, as administratrix of her husband's estate, to recover damages for the death of her husband, caused—as claimed by the plaintiff—by and through the negligence of the defendant railway company. At the conclusion of plaintiff's testimony, on motion of the defendant, the common pleas court directed the jury to return a verdict in favor of the defendant. After the overruling of a motion for a new trial, judgment was entered on that verdict in favor of the railway company, and it is to reverse that judgment that a petition in error was filed in this court.

The case raises the question of the duty of the railway company in the premises and whether the evidence offered by the plaintiff showed any negligence on the part of the railway company; and, further, whether it showed that the deceased was guilty of such contributory negligence as would bar a recovery by his administratrix for his death.

The accident occurred in September, 1901, at which time Kracht was in the employ of the railway company as a car repairer, and had been employed in such work for some time prior to the accident. He was a man of ability and of experience in the performance of that kind of work; there is no claim that he was inexperienced. It was a portion of his duties to aid in the repair of cars which were in the yards of the company; and, for the purpose of repairing these cars, there was a side-track upon which such cars were run and left standing near Air Line junction in the city of Toledo, and after the cars were run upon this track, if they needed repairs that necessitated the taking of the trucks out from under them, they were "jacked

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up," as it is called, and the body of the car was set on heavy barrels, and after the trucks had been taken out, if repairs were necessary to the bottom of the car, men would go under the car to make those repairs. In this case Kracht and three other men were directed to make repairs upon a car. The car was jacked up in this way—Kracht assisting in doing it—and after the body of the car had been raised sufficiently, both ends of the car were set upon heavy barrels—a barrel under each corner, and timbers extended across the barrels—and thus the body of the car rested and the trucks were taken out. There was something out of repair underneath this car, the nuts on the bolts needed tightening, and also something out of repair at one end, and some apparatus was out of repair, situated about the middle of the car underneath. After they got the car upon the barrels, Kracht and a man named Buck, another employe, went under the car to work, near the west end of the car, perhaps two or three feet from the end. Two other men were working near the middle of the car, repairing the truck apparatus. After they had been at work for some time—having commenced to work in the morning—the foreman came to them and inquired whether they were going to get the car "fixed" that day, and some of the men said they thought they would; but the time went on and they did not get it finished, and the foreman came over again, and for some reason it seemed to be desirable to have the car repaired that day, so the foreman in the afternoon sent three other men to aid in the repair of the car; had told them to assist, saying to them, and perhaps to all of them, to be careful not to get hurt. These three men first repaired the end board of the car, at the west end, which work occupied them but a few minutes. After that they went to the east end of the car—which had been also jacked up and was resting on barrels at each corner—and, procuring jacks, proceeded to raise that end of the car, Kracht and Buck being at work under the other end of the car, which was thirty-five to forty feet long. Perhaps only two of the men went to the east end. After they had jacked up the car at the east end and had taken out the barrels and timbers, according to the weight of the testimony, they then undertook to put the truck under the body of the car, and just

as they had gotten a very little of it under the body of the car, for some reason, which is not very clearly shown in the record, the car slid, or "slewed," as stated by some of the witnesses, to the north. The record does not state just how many feet this car was from the ground, but it was so near that the men who were working underneath it sat on the ground and did their work of tightening the bolts and the other work in that way; it was probably about four feet from the ground. The car, just as they got the edge of the trucks under it, slid to the north; the northwest corner of it, near where Buck and Kracht, the decedent, were working, also sliding to the north. These four men were still all working under the car. Kracht noticed that the car was falling, and called out to "Look out! The car is falling," or that in substance. Buck, who was working at his side, leaped to the south and the two men near the middle sprang out, and those three escaped. Kracht undertook to escape towards the north, but the car slid in that direction and fell upon him, and he was so injured that he died within two or three days afterwards.

It was claimed by the plaintiff in her petition and upon the trial of the case, that Kracht was in the line of his duty at this time, and that without any negligence on his part he was injured in the manner described, and that the railway company was negligent and liable on account of that negligence, which is stated in her petition as follows:

"That the defendant well knew, or by ordinary care could have known, that decedent and its other employes would necessarily work under said and other cars while so resting on said barrels, yet defendant was careless and negligent in the premises, in that, that it failed and neglected to make reasonable provision and regulations for the protection of decedent and its other employes against the danger of having said car raised, moved, or in any wise disturbed while said car was resting on said barrels, and while the decedent and its other employes were working thereunder, and in failing to provide that notice or warning should be given to those under said car when the same was about to be raised, moved, or in any wise disturbed, and in failing to make any reasonable provision for decedent's protection while he was at work under said car, and to guard him against the danger of said car being thrown upon him."

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The defendant denied all allegations of negligence and alleged that if the decedent sustained any injury by reason of the negligence of any one other than himself, it was the negligence of fellow servants—co-employees in the same common service—for which the defendant could not be held responsible, and set up further, that whatever injury he had sustained was on account of his own negligence. So that the question presented is, whether the evidence which was offered by the plaintiff, tended to show negligence on the part of the railway company, or failure of duty on the part of the railway company towards this employe in any respect; and, whether, if this were true, there was evidence which showed that the decedent was guilty of contributory negligence which would prevent a recovery? It is claimed by the plaintiff, as set forth in her petition, that it was the duty of the railway company to protect the decedent, Kracht, against such an accident as this, while he was under the car at work; that either the foreman or some one should have been on the ground to notify him in case the car was raised at the other end, to notify him that that was being done, so that he might get out, and that it was the duty of the railway company to have provided some rule or regulation requiring such notice to be given to men at work under cars in this manner, before the car or any part of it was raised; and it is claimed that the failure to provide either of these things was negligence.

It is claimed by the railway company that this was an ordinary piece of work, the repairing of this car, a very common piece of work; that Kracht had been engaged at such work for a long time; that the fact that the car might possibly fall was known to him and that the company was not under obligation to have such rules as these, or to have any one posted outside of the car to call out to the men underneath the car in a case of peril of this kind; and it is claimed further that this was one of the assumed risks of the duty in which Kracht was employed, he knowing the danger when he did that work; and, further, that Kracht himself was guilty of contributory negligence in this, as claimed, that the record discloses that Kracht knew that these men who came to assist had gone to the other end

of the car, and that while there they would raise the car, jack it up and take the barrels out and put the trucks under. It is claimed that Kracht had full knowledge of this from what was said there and done there, aside from his knowledge of the work; and that he voluntarily remained under the car with this knowledge, and therefore assumed the risk himself and took the chances of injury, and, instead of getting out from under the car or keeping watch to see when the men undertook to put the trucks under the car and getting out from under the car then for his safety, it is said that he remained under, knowing that this was being done, and that he therefore assumed the risk and contributed to whatever injury he suffered.

The court found under the evidence offered by the plaintiff that plaintiff could not recover; that there was no evidence tending to show liability on the part of the railway company; that there was no duty resting on the railway company to make any such rules or regulations or to keep watch as claimed by the plaintiff.

We have read the record through very carefully and it appears that when these three men left the west end of the car, according to some of the testimony offered, some one said that they would go to the other end of the car and do what was necessary to be done there; and that was heard by some of the men—perhaps by some of the men working under the middle of the car—or one of them; and it is claimed, on the question of contributory negligence, that Kracht must have heard this and known it. But Buck, who was working by the side of Kracht and only a few feet from him, testified that no notice was given to him that the men at the other end of the car were about to jack it up and put the trucks under, that he had no knowledge that they were about to do anything of that kind, and that he did not hear anything said by the men about going to the end of the car to do anything of the kind; and the weight of the testimony is that it was customary when work of that kind was done at the end of the car, with men under it, for the men to get out from under the car; and Buck testified that if he had known they were about to do this or anything else of this kind at the other end of the car, he would have got out and not have

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remained under it. Kracht is dead and can not testify as to whether he knew what these men were doing at the other end of the car or not. But the man who was at work beside him testified that he knew nothing about that; that he had no notice or knowledge, and that, so far as he knew, Kracht had no knowledge. They were both at the time with their backs towards the east end of the car where this work was going on, sitting on the ground and looking up at the floor of the car over their heads, and Kracht was engaged in tightening nuts on some bolts directly over his head, looking at them and intently engaged at his work. It seems to us that it can not be held as a matter of law that Kracht was guilty of negligence contributing to his injury in not knowing or seeing what was going on at the other end of the car. We think that we could not, and ought not as a matter of law, to hold that Kracht had knowledge of what was going on there; that was a question to submit to the jury, under all the circumstances. If the jury should find that he did have knowledge, and staid under the car, taking his own risk, the court could not say that the jury were not warranted in so finding. But there was the evidence of Buck tending quite strongly to show that he had no such knowledge or notice.

As to the duty of the railway company, whether there was any duty imposed upon it to care for him and to guard him against such injury which he was under the car, or to have a rule of some kind to provide for this—the general rule, well established, is that the employer is bound to furnish his employes a reasonably safe place in which to work, and bound to exercise ordinary care in that respect, and that the employe does not assume the risk consequent upon the failure of the employer to perform this duty. The question here is whether there was any evidence tending to show that the railway company had failed in its duty to exercise ordinary care in furnishing a reasonably safe place for Kracht to work. He was directed by the foreman—either by special or general direction—to repair this car. In order to do so it was necessary for him to go beneath the car; it was necessary to jack up the car as was done. This car weighed many tons, and to do this work properly it was necessary for Kracht to sit down on the ground under the

car with his eyes directed towards the floor above him in order to see what he was doing; and while he was in that position he could not see or know fully what was going on at the other end of the car. It was necessary some time in the course of this work to have the other end of the car raised and these barrels taken out and the trucks put under. All this was known to the railway company and its officers and foreman. A Mr. Bay was the foreman, or assistant foreman, immediately in charge of this work. He was in the yard, or about there, but was not on the ground at this car when the accident occurred. He had directed these three men to go to this car and aid in the performance of this work, and knew that in the doing of that work all these things would have to be done. Knowing the position in which Kracht and the other men were, he must be presumed to know the danger of the car falling upon them in case the men undertook to move the car at one end while the men were under the car. The evidence shows that nobody had ever been hurt in this yard in this way before, but it does not show that cars had not fallen in this manner before, but it tended to show that the men always got out from under the car before anything of this kind was done.

The leading case of *Lake Shore & Michigan Southern R. R. Co. v. Lavalley*, 36 O. S., 221, prescribes the duty of the railway company where an employe is put to work in a place of peril. The second paragraph of the syllabus in that case is:

“It is the duty of a railroad company to make such regulations or provisions for the safety of its employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties.”

And again, in the syllabus:

“That it was the duty of the foreman in putting the hand to work under the car to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care, the company is liable.”

This was a case, as is well known, where a man was put to work under a care in a yard where they were moving cars, and

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other cars were liable to run into this car, and while the man was there at work, another car was run into the car that Lavalley was working under and he was hurt—Lavalley being a car repairer, and it was held that the railroad company was liable. The whole question is discussed fully in the opinion.

Another case bearing somewhat on this same question is found in 37 O. S., 549 (*Railway Co. v. Henderson*). This is the syllabus:

“Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact to be determined by the jury under proper instructions.

“Where an action is brought against a railroad company by one of its employes to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company, as to the management of a particular train, which order was unreasonable, and the enforcement of the same was dangerous to such employe, the fact that the negligence of a fellow servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action.”

As is said in some cases, rules may be required, and are sometimes required, in the exercise of ordinary care, and other precautions may be necessary for the purpose of protecting employes against the negligence of fellow servants. As in the Lavalley case, it may be said that the employes who ran the car against the one under which Lavalley was working, were negligent, but this did not preclude a recovery.

In 38 O. S., 389 (*Dick v. R. R. Co.*) the Supreme Court say, in the syllabus:

“As between employes of a railroad company whose duty it is to repair its track while trains are using the same, and the company and its representatives, who are engaged in running trains over the same, where the trackmen are so employed, it is the duty of the latter, as far as is practicable, to adopt such precautions as will guard its employes on the track from dangers incident to their employment.”

These questions are discussed in the opinion and in the *La-valley* case referred to and cited with approval. These are cases where an employe was injured by a moving car or a moving train. In our judgment the principle is the same where an employe under a car is injured by reason of the car being moved or struck in any other way, if such a thing was liable to happen; it makes no difference whether it was a moving train or any other object or person that moved the car, if the man was under it, or whether it was thrown down, as this was, or knocked over, if it was something that was liable to happen, if it was a thing that was imminent and pending while the man was under the car.

The *Murphy* case, reported in 50 O. S., 135, is in point. The man in that case who was killed was put at work upon a railroad track which was straight with the view unobstructed, and while he was at work there a train came along, struck and killed him. It was claimed that the railroad company should have made some provision to protect him while at work; should have had a rule requiring notice to be given, or should have had some one there whose duty it was to warn him of the approach of trains. The Supreme Court held, as stated in the syllabus:

"It is the duty of a railway company to afford reasonable protection to its employes against dangers incident to their work. And if under the circumstances of this case a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not, was a question for the jury."

Upon the question of contributory negligence, the court say, in the last paragraph of the syllabus:

"The evidence as to contributory negligence on the part of deceased made a case which, at least, was doubtful, and about which different minds might differ as to the proper inference to be drawn. Such a question can not properly be determined by the court as matter of law, and should be submitted to the jury."

The question is fully discussed in the opinion. The court say, on page 143 (Judge Spear delivering the opinion):

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"Negligence is always an inference from facts put in evidence, as contrasted with a fact which is the subject of direct proof. The proof disclosed facts calling for logical, as distinct from legal, deduction. Where that is the case the question is for the jury and not for the court. And, whether or not, under the circumstances of the case at bar, the company should have anticipated the necessity and exercised proper precaution, by prescribing a rule requiring warning, was clearly a question for the jury. Of like character was the question of contributory negligence. As matter of law the court could not say that it was not the duty of the company to provide any means to warn men in that position of approaching danger, nor that, as matter of law, the deceased was negligent because he did not interrupt his work sufficiently to protect himself from approaching trains."

It seems to us that the Murphy case was a stronger one for the railway company than the case at bar. Murphy, as I have said, was at work on a straight track, and had an unobstructed view of the train which came down the track in broad daylight and struck him, but the Supreme Court held that he could not be presumed to have seen the train or be guilty of contributory negligence. In the case at bar, Kracht was seated upon the ground under the car, with his eyes upon the floor of the car above him, intent upon his work, and the acts which resulted in the car falling upon him were going on at the east end of the car, behind him. And it seems to us that under the rule laid down in the Murphy case the court could not say that Kracht was guilty of contributory negligence, nor that the railway company was not guilty of any negligence in the premises. It is clear that if there had been some one on the ground to notify the men under the car that this work of raising the car was being done, that they would have gotten out from under the car safely. It is clear that if there had been a rule requiring notice to the men engaged under the car to get out whenever work of this kind was commenced, if the rule had been complied with, Kracht would have been saved. Whether ordinary care required such a provision or rule, requiring the foreman to give the men notice, or requiring some one to do it—whether ordinary care required that—we think was a proper question to submit to the jury. This was not a risk that Kracht

assumed, if it was a danger caused by the negligence of the master, as was said by the Supreme Court in 61 O. S., page 298 (*Van Duzen, etc., v. Schelies*):

“A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident.”

In Vol. 43, Atlantic Reporter (May 24, 1899, *Rex v. Pullman Car Co.*), Chief-Justice Lore of the Superior Court of Delaware, at the February Term, 1897, in his charge to the jury in a negligence case, uses this language:

“This is a case of master and servant, and the rights, duties and obligations of that relation govern it. The primary duties of the master are—First, to provide a reasonably safe place for the servant to work in or upon; second, to provide him with reasonably safe tools and machinery with which to do his work; third, to employ reasonably competent and careful co-workers and fellow servants; fourth, to promulgate proper rules for the government of such servants, in operating his business, where the extent of that business exceeds the limits of his personal supervision. The servant assumes no risk whatever as to these primary duties of the master when he accepts employment; but he does assume all the ordinary risks of the employment, including therein the negligence of his fellow servant.”

In Beach on Contributory Negligence, Section 304, the author says:

“Whenever the negligence of the master, united to the negligence of the fellow servant, contributes to the injury, the servant injured thereby may recover from the common employer. The servant will not be held to have taken any chances of negligence on the part of the master, and it is believed that no case has gone so far as to hold that where such combined negligence contributes to the injury the servant may not recover. It would be both impolitic and unjust to allow an employer, under those circumstances, to evade the penalty of his misconduct in neglecting to provide for the security of his servant. Contributory negligence in order to defeat a right of action in such a case must be solely the negligence of the party injured, or the

negligence of a co-employee unmixed with any negligence or default on the part of the common employer.”

Upon the general principles involved in this case may be cited: 24 O. S., 83; 41 O. S., 438; 9 C. C. Reports, 340; 38 Nebraska, 488; 59 Northwest R., 950; 113 Mo., 319; and 49 N. Y., 420.

It is clear that the place in which Kracht and the other three men were at work was a place of danger; and it was apparent that in the performance of the work it would be necessary to raise the other end of the car to put the trucks under; and, clearly, while the work was being done it would be very dangerous for these men to remain beneath the car, and if they were left there, they were in danger of being crushed by the falling of the car. It does not require expert testimony to show that where a car is resting upon barrels, as this car was, to lift one end of it with jacks, to put a truck under it, might easily result in the car being tipped or slid over to one side, either by the ground sinking, the car slipping, or by one end being raised higher than the other, or in many ways; and for men to be under the car while that kind of work was going on was extremely perilous. And we are of the opinion that the question whether the railroad company should have made provision to notify Kracht, if anything like this was to be done to the car, was a question to submit to the jury; and whether it was the duty of the railway company, through its foreman, to have either done that himself or to have had some one there in his absence, or a rule was necessary requiring notice to men under the car in a situation of peril such as this, was a proper question for the jury. The question whether Kracht was guilty of contributory negligence was not a question to be determined by the court. The most that can be said is that the evidence on that point was conflicting. The rule in this state is, that where there is any evidence tending to sustain all the material elements of the plaintiff's case, the court can not withdraw the case from the jury, but it must be submitted to them for their decision upon the questions of fact.

We are of the opinion that the court of common pleas erred in directing a verdict for the defendant in this case; that the

motion to that end should have been overruled and the case submitted to the jury upon proper instructions as to the law, by the court. For these reasons the judgment of the court of common pleas will be reversed and the case remanded for a new trial.

E. L. Twing, for plaintiff in error.

E. D. Potter, for defendant in error.

ATTACHMENT IN ACTIONS FOR NECESSARIES.

[Circuit Court of Cuyahoga County.]

THE K. B. COMPANY V. JAMES BATIE.

Decided, December 24, 1903.

Attachment—In Actions for Necessaries—Ten Per Cent. of Debtor's Personal Earnings Not Exempt, When—What Affidavit Should Contain—Failure to Make Demand No Ground for Discharging Attachment—Personal Service of Demand.

1. Ten per cent. of a debtor's personal earnings are not exempt from execution and attachment where the claim, debt or demand for the payment of which it is sought to subject them is for necessities furnished to the debtor, his wife or family, since April 26, 1898.
2. In an action for necessities the plaintiff may have an order of attachment when the affidavit therefor sets forth merely the nature of plaintiff's claim, that it is just, the amount affiant believes the plaintiff ought to recover, that the property sought to be attached is not exempt from execution, and, if personal earnings are to be attached, that the claim on which judgment is sought is for necessities, without mentioning any of the nine specifications, the existence of one or more of which must be stated when the action is not for necessities.
3. An attachment issued in an action for necessities should not be discharged because the plaintiff has failed to make a demand in writing for the excess over and above ninety per cent. of the personal earnings of the debtor.
4. The demand in writing for the excess over and above ninety per cent. of the personal earnings of the debtor, provided for in Section 6501, Revised Statutes, must be served upon the debtor personally.

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WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to court of common pleas.

October 22, 1903, plaintiff brought an action against defendant before a justice of the peace to recover "the sum of \$20.25 for necessities, to-wit, clothes sold and delivered," and with his bill of particulars filed an affidavit in attachment in which it was alleged, "that said defendant is justly indebted to said plaintiff in the sum of twenty 25-100 dollars, for necessities, to-wit, clothes sold and delivered; that said claim is just and lawful; that he believes said plaintiff ought to recover thereon the amount of \$20.25, with interest as hereinbefore stated, and that the property about to be attached is not exempt from execution; that said property is the personal earnings of the defendant for services rendered by the defendant, and only ten per cent. of said earnings and four dollars is sought to be attached; that the claim for which judgment is sought is for necessities contracted since April 26, 1898; that the said defendant is the head or support of a family, and has not in good faith, the maintenance and support of a widowed mother wholly dependent upon him for support."

Order of attachment was issued and served upon the employer of the defendant, as garnishee, on October 28, 1903.

Thereafter motion was made by the defendant before the justice to discharge the attachment, and said motion being overruled, the matter was appealed to the common pleas court, heard by said court upon the original papers and affidavits, and the attachment was discharged.

Petition in error has been filed in this court by the plaintiff below, together with a bill of exceptions setting forth all the testimony given in the court below, from which it appears that the merits of plaintiff's claim were not contested, but the defendant based his right to a dissolution of the attachment upon the following grounds:

1. That plaintiff being a partnership, transacting business in this state under a fictitious name, could not maintain the action until it had complied with the requirements of Sections 3170-1 to 7, Revised Statutes, and had filed a certificate with the clerk of the court of common pleas, as therein prescribed.

2. That the property sought to be attached was exempt.

3. That there was no proof that plaintiff had made a demand in writing upon his debtor for the excess of his personal earnings over and above ninety per cent. thereof, as required by Section 6501, Revised Statutes.

4. That if such demand was made, it was more than thirty days before the garnishee was served with process, and therefore would not bind any money in his hands coming due to the debtor after said thirty days.

The first objection may be considered by itself, and the second, third and fourth objections together. As to the first objection, it does not appear whether plaintiff had filed the certificate of partnership as required by Section 3170-1 to 7; there was no testimony on the subject. Section 3170-6 provides that if the partners shall at any time comply with the provisions of the act, then such partnership shall have the right to commence an action, or, if such action has been commenced, to maintain it. We incline to the construction of this statute which holds that failure to comply with it is a defense. *J. W. Hartzell & Co. v. Warren*, 11 C. C., 269.

The defense was not proved and there was no presumption against the plaintiff that it had not complied with the law. The statute is penal in its nature and should be strictly construed.

The second, third and fourth reasons alleged by the defendant require an examination of the recent amendments of the exemption and attachment laws found in 93 O. L., 321 and 94 O. L., 376.

These recent enactments make it plain that ten per cent. of a debtor's personal earnings are no longer exempt from execution and attachment where the claim, debt or demand for the payment of which it is sought to subject them is for necessities furnished to the debtor, his wife or family since April 26, 1898, the date of the passage of the first of said acts.

It also appears that in an action for necessities the plaintiff may have an order of attachment when the affidavit therefor sets forth merely the nature of the plaintiff's claim, that it is just, the amount affiant believes the plaintiff ought to recover, that the property sought to be attached is not exempt from

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execution, and, if personal earnings are to be attached, that the claim on which judgment is sought is for necessities, without mentioning any of the nine particulars, the existence of one or more of which must be stated when the action is not for necessities, (Section 6489, Revised Statutes). The affidavit in this case complied with this section of the statutes. The claim was for necessities, and the property sought to be attached was the excess of the personal earnings of the debtor over and above the ninety per cent. thereof which was exempt by law.

But it is claimed by virtue of Section 6501, Revised Statutes, that the affidavit should also contain an allegation that the plaintiff had made a demand in writing upon his debtor for the said excess of his personal earnings, or, in any event, that the attachment should be discharged upon a showing that such demand had not been made. These claims are based upon the following proviso in said section:

“The person bringing an action for necessities shall first make a demand in writing for the excess over and above ninety per centum of the personal earnings of the debtor.”

To give such construction to this clause as is claimed by counsel for defendant in error would be to hold that no action for necessities, even without attachment proceedings, could be brought without such demand. Such was not the intention of the Legislature.

Reading Section 6501 with reference to the question here raised, and stripping it of its verbage and other matters not pertinent to this case, it provides as follows:

A garnishee may pay the money owing by him to the defendant to the constable and he shall be discharged from liability to the defendant for any money so paid, and not be subjected to costs, but allowed his own costs, provided, that he may pay to such debtor ninety per cent. of his personal earnings, less the sum of four dollars for costs, and be released from any liability to such creditor; provided further, that the person bringing an action for necessities shall first make a demand in writing for the excess over said ninety per cent., and no cost or expense shall be chargeable to the defendant debtor if he tender pay-

ment in money or duly accepted order for the said excess of his personal earnings.

We think that the purpose of this enactment was to enable a debtor for necessities to save himself from costs accruing as the result of garnishment of ten per cent. of his personal earnings, by tendering payment in money or a duly accepted order for said amount. It follows that neglect to make such written demand would put the costs upon the plaintiff, or upon the garnishee, if he should pay in the absence of such demand, for the statute reads: "No costs or expense shall be chargeable to the defendant debtor if he tender," etc., and the authority with reference to the payment to the constable or withholding from the debtor of four dollars over and above ten per cent. of his wages is upon the proviso that said written demand be made. That such is the construction to be put upon the statute is gathered not only from a reading of it, as it now appears, but by a consideration of what must have been the intention of the Legislature in enacting the amendment of April 16, 1900, as shown by a comparison of the law as amended with the law as it was under the amendment of April 26, 1898.

It does not follow, however, that an attachment should be discharged because either the affidavit in attachment or the proof does not show a demand in writing for the excess over and above ninety per centum of the personal earnings of the debtor, and we so hold.

An affidavit, part of the records in this case, shows that plaintiff on September 21, 1903, left a written demand for "the excess over and above 90 per centum of your personal earnings for the week ending September 21, 1903, or in lieu thereof an accepted order on your employer" with the wife of the defendant at his residence, and that she subsequently told him that she had given it to her husband. The husband's affidavit denies receiving the demand. It is not necessary for a determination of the case on error in this court to pass upon the sufficiency and effect of said demand or its service, but as the original action still stands undisposed of before the justice of the peace, it may be proper to say that there was in this case a failure to prove service of the demand. The statute does not specify how the demand should

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be served, and it has been repeatedly held that "Where a statute requires the giving of notice and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, personal notice must always be given." 21 Am. & Eng. Enc. of Law, 583.

For error in granting the motion to discharge the attachment the judgment of the court of common pleas is reversed.

Hart & Canfield, for plaintiff in error.

A. A. Maresh, for defendant in error.

NEGLIGENCE IN THE OPERATION OF A RAILWAY INTERLOCKER.

[Circuit Court of Franklin County.]

THE TOLEDO & OHIO CENTRAL RAILWAY COMPANY v. CHARLES
E. HYDELL.

Decided, February 1, 1904.

*Negligence—Railways—Interlocking Devices at Crossings of, at Grade
—Responsibility for Operation of—Can not be Shifted to Company
Controlling the Operator—Agency—Parties—Privity of Contract.*

1. Where an interlocker is maintained at a crossing of two railroads at grade, it is competent for the companies to enter into a contract providing that the device shall be operated by one of them, subject to the limitation however, that the responsibility of the other company for the proper operation thereof on its own road is not thereby shifted, in so far as the public and third parties are concerned.
2. No new liability arises upon such contract against the railroad companies, in favor of parties not in privity therewith; but each company is responsible to the public and third parties, for the full performance of its statutory duty at such crossing.
3. The leverman in control of the interlocker under such contract is, except as between the companies themselves, the agent and servant of the company whose road and trains he is, for the time being, assisting to operate.

WILSON, J.; SUMMERS, J., and SULLIVAN, J., concur.

On the 4th day of January, 1901, Charles E. Hydell, who was at that time in the employ of the P., C., C. & St. L. Ry. Co.

as a brakeman, was injured by the derailment of a freight train of that road on which he was serving, through the negligence of a leverman who was operating the interlocker at Mound Station, six miles west of Columbus, where the T. & O. C. Railroad crosses the Pennsylvania line at grade. The crossing and interlocker were maintained and operated by the T. & O. C. Company under a contract for that purpose entered into with the Pennsylvania Company, in consideration of the right to cross the tracks at grade.

Hydell filed his petition in the court of common pleas against the T. & O. C. Company, setting out the contract between it and the Pennsylvania Company under which the interlocker was being operated at the time of the accident, the negligence of the leverman, and the extent of his injuries.

The defendant demurred to the petition for defect of parties defendant, and that it did not state a cause of action against the T. & O. C. Company. The demurrer was overruled, and the defendant answered in the way of a general denial, and with an affirmative defense, alleging that the plaintiff had settled with and released the Pennsylvania Company, which was liable, by accepting the benefits of its voluntary relief department, and had thereby released the T. & O. C. Company, if it had been liable. The reply was, in effect, a general denial of the affirmative defense. Upon the trial of the case the plaintiff obtained a verdict for seven thousand dollars. A motion for a new trial was overruled, and judgment was entered on the verdict. A bill of exceptions embodying all of the evidence was taken, and the case is brought into this court upon the whole record, seeking a reversal of the judgment.

At the time of the injury, which is the predicate of the action, it was the duty of the railroad companies crossing at grade, under the statute, to see that the crossings were put in and kept in repair; to employ a watchman at the crossing; to stop all trains at a given distance, and to cross only upon a given signal—unless, under a further provision of the statute, they installed and maintained, to the satisfaction of the commissioner of railroads and telegraphs, a system of interlocking, or other works or fixtures, which would render it safe for

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engines or trains to pass over such crossing without stopping. Revised Statutes, Section 3333, 247g.

Such an interlocking system was installed at this crossing under the contract of date July 24, 1893, hereinbefore mentioned. By its terms the T. & O. C. Company, among other things, agreed to "erect and thereafter maintain and operate at its own expense, at the place of said crossing, an interlocking system which shall be satisfactory to the signal officer of the first party (the P., C., C. & St. L. Ry. Co.), and under the operation of which trains of either party may be permitted, under the laws of the state, to cross over said crossing without coming to a stop."

The trains of both roads were being controlled at the crossing, by the interlocker operated under this contract, by levermen employed and paid by the defendant company, and it was the negligence of one of these levermen that caused the injury.

The contention of the plaintiff below, defendant in error here, is that the leverman was the agent, exclusively, of the defendant company, and that, consequently, it alone is liable for the injury. This contention is supported, in argument, by a long line of authorities, the most persuasive of which are, perhaps, the contracts for tracking privileges, such as *Smith v. New York & Harlem Railroad Company*, 19 N. Y., 127; *Merrill v. Railroad Co.*, 54 Ver., 200, and *Hurlbert v. Wabash Ry. Co.*, 130 Mo., 657. These cases are, we think, distinguishable however, in that it was the duty of the roads held to be liable, under the contracts, as well as under their franchise to keep the tracks or the machinery in repair, the failure to do which was the negligence complained of. Another class is the gates at crossing cases, of which *Brow v. Boston & Albany Railroad*, 157 Mass., 399, and *Buchanan v. The Chicago, M. & St. P. Ry. Co.*, 75 Iowa, 393, are examples; but these authorities, in so far as they would seem controlling, are in conflict with *Railroad Company v. Schneider*, 45 O. S., 678.

The defendant's claim is, first, that it and the Pennsylvania Company were without authority in law to enter into a contract as against the public and third parties, whereby one road should agree to perform the statutory duty of the other, and that,

therefore, the defendant could not, under such a contract, become liable for the mismanagement of the Pennsylvania Company's track and trains at this crossing.

In the case of *Railway Company v. Schneider, supra*, it is said in the body of the opinion, page 696:

"It (the railway company) might, by proper stipulation in the agreement of the railroad company with which it contracted, require it to furnish competent servants for the transaction of its business, and hold it responsible for any breach of the agreement; but it can not by such contract, or by its failure to so contract, shift either the duty it owes to those using the street, or its responsibility to them."

So here it was competent to contract for the services of efficient levermen, subject to the limitation that the Pennsylvania Company could not shift its responsibility, so far as the public and third parties were concerned.

But, secondly, it is contended that, notwithstanding this contract, and that under it the defendant was employing and paying the levermen whose duty it was to operate the interlocker, when it was so operated for the benefit of the Pennsylvania Company, in the conduct of its trains on its road, the leverman was, for that time and purpose, the agent of that company, or, at most, the joint agent of both companies. So that, in either event, the T. & O. C. Company is not liable in this action. We do not find it necessary to review at length the numerous authorities cited by counsel to support this proposition. From a consideration of all the authorities it would seem there is no hard and fast rule which determines the question of agency, alike in all cases; but that the rule, in a marked degree, is made subservient to the facts in each case, and is fixed accordingly.

The trial court disposed of the case, and supported the judgment upon the theory that it was lawful for the railroad companies to enter into the contract for the employment, by one for the other, of competent agents to operate the interlocker; that the contract did not relieve the Pennsylvania Company from liability for negligence toward the plaintiff; that the leverman, serving under the contract, was the agent of the T. & O. C. Company, and not the agent of the Pennsylvania Company; that the Pennsylvania Company could, notwithstanding the con-

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tract, be held negligent because it had not kept a leverman in charge of the interlocker; that the jury might find the plaintiff, by entering upon the employment with knowledge of the fact that the Pennsylvania company did not employ a leverman of its own, waived any right of action he might otherwise have had on account of such negligence; and for that reason the plea of settlement with that company would be no defense in this action. To this effect the court charged the jury.

The case thus made out would appear to be illogical. If it be lawful for the Pennsylvania Company to provide by contract with the T. & O. C. Co. for services of competent levermen to operate the interlocker, and such levermen do operate it, it is difficult to conceive how the company could still be negligent for failure to employ levermen. It had discharged that duty in a way the law permits, and in a way the court held it might do. To hold otherwise would be to deprive the contract, in that particular, of any legal status whatever so far as the plaintiff is concerned; and the court would be driven to the support of the first contention of the plaintiff in error, that the contract for the purpose of this case was null and void.

If the Pennsylvania Company could not be found negligent in that respect, then the proposition that the leverman was the agent of the T. & O. C. Company only, can not stand with the proposition that the Pennsylvania Company could not contract against liability for negligence. For, not being negligent for failure to employ competent servants to operate the device, and not liable for the negligence of the servants of the T. & O. C. Co. when they are doing the work of the Pennsylvania Company at the crossing, it is permitted to operate that particular part of its road without any liability for negligence; and this would be effected by the contract.

When it is conceded that it may contract with the other company for the employment of levermen to operate the interlocker, but that it can not so contract as to relieve itself against negligence in the performance of that statutory duty, it follows that it must be held liable for the negligence of the servants, who by its procurement are performing that duty. They are *pro hac vice*, its servants. It has adopted and accepted them as such for the performance of that particular duty, at that time

and place, by the terms of the contract; by accepting and relying upon their services; by issuing instructions to them, as the statute requires. The leverman whose negligence caused the injury was, at the time, the agent of the Pennsylvania Company. *Railway Company v. Schneider, supra*; *W., St. L. & P. Ry. Co. v. Payton*, 106 Ill., 535.

The relation of the T. & O. C. Company to the operation of the Pennsylvania Company's trains at this crossing was wholly contractual. The plaintiff was not in privity with the contract and can have no rights under it. What are the rights of the respective railroad companies under this contract, with reference to the accident, we are not called upon to determine in this action.

It follows that the demurer to the petition, in the opinion of this court, should have been sustained, for that it did not state a cause of action against the T. & O. Company. The action sounds in tort, and not in contract. It was not necessary to the plaintiff's case to plead the terms of the contract between the railroad companies, but proper, for the purpose of raising the question, whose agent was the negligent leverman, under the facts pleaded, which is the controlling question in the case.

Having resolved this question against the plaintiff, it follows, also, that there was error in overruling the motion to direct a verdict for the defendant, which was interposed at the close of the plaintiff's evidence; and error in the charge of the court.

The request by the defendant to charge, which was given by the court, is inconsistent with the general charge. It is therein stated to be the law that as the Pennsylvania Company could not contract away its responsibility, it would be responsible for the negligence of any one operating the system of interlocking for it by contract. This is a correct statement of the law, but it can not be reconciled with the general charge, which states that the leverman was the agent of the T. & O. C. Company and not the agent of the Pennsylvania Company for any purpose.

We find no other error upon the record. The judgment is reversed, and the cause remanded.

C. T. Lewis and Barger & Barger, for plaintiff in error.

Lentz & Addison, for defendant in error.

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DOWER IN THE PRODUCT OF OIL WELLS.

[Circuit Court of Wood County.]

CASSA M. WILLFORD V. JOHN B. HEIMHOFFER ET AL.

Decided, March 26, 1903.

Dower—In the Production of Oil Wells—Sunk After the Death of the Husband—Right of the Doweress in Oil from Land Assigned to Her—Partition of the Lands—Effect of Provision Depriving Doweress of Interest in the Oil.

1. A doweress has the same rights in oil wells sunk upon the lands of her husband after his death that she has in wells sunk before his death; and where the rents and profits of a tract of land are assigned to her, the oil production from that land is clearly hers.
2. An order made in the probate court, upon confirmation in partition proceedings, which deprives the doweress of her rights in oil produced from a tract of land assigned to her in such proceedings is *coram non jure* and void, and is not a bar to her right to recover.

HAYNES, P. J. (orally); HULL, J., and PARKER, J., concur.

Appeal from common pleas court.

This case is in this court on appeal. The plaintiff in her cause of action against the defendants says she is the widow of Lewis D. Willford, who died seized of forty acres of land in Wood county, and the detailed description is given. She says she held the premises as tenant in common with the heirs at law of said Lewis D. Willford until the 3d day of September, 1895, when such proceedings were had in the probate court of the county, that a decree of partition was entered by said court and the premises ordered sold subject to her dower interest therein; that the commissioners appointed by the court to appraise said premises and assign to plaintiff her dower, did assign to her the rents and profits, for her natural life, of ten acres (which are described). That the premises were then sold on the 3d day of September, 1895, subject to plaintiff's dower interest therein, to one John B. Heimhoffer, who is still the owner thereof. She says that on September 19, 1894, she, and all the heirs at law of said Lewis D. Willford, executed and delivered to Frederick G. Moon an oil lease on said premises, and that

Moon and his assigns have and are producing oil on the premises up to the present time. That on December 25, 1895, Dorr R. Willford and Charles H. Willford, two of the heirs, sold and assigned to the defendant, Margaret O'Brien, their undivided fourth interest of the one-sixth royalty in the oil produced on the premises, and that the said Margaret O'Brien remained in possession and received her share of the oil produced until July 20, 1898, when she sold her interest to some parties named Smith, who were doing business as The Huron Oil Company, and that they received their share of the oil until the 1st of September, 1899. She says she made due demand of Heimhoffer for an accounting of the oil produced on the premises, and that he refused to account. She says the defendants have remained in possession of the ten acres set off to her as dower since the 3d of September, 1895, and have continued to operate and produce oil therefrom, and that no part of the product has been accounted for or turned over to her; that she is unable to state the amount of oil produced from the property, or to state the amount of money, if any, paid out by the defendants in their operation of the lease. She says the defendants are held and are liable to account to her for all the oil produced on the ten acres so assigned to her, after the 3d of September, 1895, to the present time; and she says the defendants have operated said leasehold in such a manner as to completely destroy her income therefrom. She asks for a complete accounting of all the oil received and the money expended in the operation of the lease, and that upon the hearing of this cause that the defendants be required by proper decree of this court to account for and turn over to her all the oil produced on the said ten acres in September 3, 1895, after deducting the actual expenditures for lease operations; that the defendants be required to transfer said royalty to plaintiff, and that they be decreed to have no further interest therein during her life-time.

Answers were filed by the defendants, they relying, in substance, upon the fact that the dower of the plaintiff was assigned to her, subject to the said oil lease and that the one-fourth of the oil royalty in the whole of said lands, including the portion so set off to plaintiff as her dower, was ordered by the probate

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court in the partition proceedings referred to. The plaintiff filed replies to these answers denying the allegations of new matter, and alleging that the petition and all the other pleadings filed in the partition proceedings fully set forth and recognized the dower interest and rights of plaintiff therein; that no issue was raised in any of the pleadings in any manner disputing plaintiff's rights; that it was unnecessary for her to answer therein, and she did not file any answer. That prior to the filing of the petition for partition she had received a portion of the royalty by an amicable partition made thereof between the other parties who joined with this plaintiff in the execution of said lease, and that under said amicable partition she had received and was entitled to one-fifth of all the royalty from all the oil produced from the forty acres, and this division of the royalty was recognized by the averments contained in the petition; that when her dower was assigned to her she believed and relied upon the same carrying with it all the royalty produced therefrom upon the part so assigned to her in lieu of the one-fifth she had theretofore received from the whole tract; that when the commissioners assigned her dower they set apart to her the ten acres in question for the reason that there were two wells thereon that she might receive the royalty therefrom, and that said ten acres was and has been and had to be so occupied and used by oil wells and the carrying on of oil operations thereon as to render the same utterly useless for any other purpose; and then she denies that she ever transferred or authorized the transfer of her right to the royalty share of the oil produced from the ten acre tract to the defendants, and that the probate court has no authority or jurisdiction to make any such order or decree in that regard.

The case was heard upon an agreement as to the facts and some testimony, and it appears that some years ago one Lewis D. Willford died in this county seized of the real estate described, and that he left a widow, the plaintiff herein, and certain heirs at law who were of age. The heirs at law and the widow joined in and executed an oil lease on the forty acres to a certain party, and subsequently the land was partitioned. The lease was in the ordinary form and provided for the sink-

ing of four wells on the land. These wells were sunk and were productive, and at the time the assignment of dower was made in the partition case, ten acres of this land were assigned to the widow which had upon it two of these four wells. It was a general assignment of dower of that ten acres and that assignment was confirmed by the court, and after the confirmation, or at the time of the confirmation, there was an order made by the court in a journal entry in regard to the two wells on this ten acres of ground, practically providing that the widow should not have the two oil wells, but the land alone. Now the widow in her petition in this case claims the oil that has been taken from the land since the time of the assignment of dower. At the time of the execution of the original lease the power was given to one of the sons to draw the proceeds of the oil wells, and act as agent of all these parties, including the plaintiff. Subsequently he transferred that power to others, and it passed down through one to another until I think the last party was John B. Heimhoffer.

It is contended that by the assignment of dower, the widow has no right to the oil. In some cases she would have the right to the product of the oil if the wells had been sunk prior to the death of her husband. It is further claimed that this order that was made in this journal entry was conclusive upon her right to the use of these wells and the product thereof, and that she is barred by the judgment that was rendered in that case.

Now very briefly on this point: The dower question in this country is like a good many other questions; it is growing and expanding. The time was when a woman's dower was thought about as little of as she was—which was little enough. In the case of *Crocket v. Crocket*, in 2d Ohio St., page 181, there is some discussion of the question of dower, and Judge Thurman in that case stated, upon the question of the right of the widow to cut timber, how extensively the widow might cut timber.

The rule had been very rigid in ancient times. He says:

“That a widow is dowable of wild lands in Ohio has long been well settled; that she is bound to pay the taxes upon the lands when assigned to her for dower, and that the failure to do so may result in a forfeiture of her estate, is expressly

provided by statute. It follows, in our judgment, that she may by the sale of timber raise money to pay taxes; otherwise the estate would be a burden instead of a benefit to her. * * * It is well settled that many things may be done by a tenant for life here that if done in England would be waste; as for instance, the conversion of meadow or pasture into plowland, or woodland into a farm, etc. And it is also settled here that timber cut in improving the land belongs to the tenant for life and not to the reversioner. We are also of the opinion that where, as in the present case, the dower assigned consists of certain wholly unimproved and unproductive town-lots and a tract of woodland, the assignment is to be considered so far as an entirety as to authorize the sale of timber to pay the taxes on the lots as well as on the land. But we think the right to sell goes yet further," etc.

It will be noticed that in this case they recognize the right to change woodland into farmland, and giving to the widow the timber itself, a thing that would startle an old-fashioned Englishman out of his grave.

There is a very instructive case in the 52 N. W. Rep., page 299, *Seager v. McCabe*. In that case a man had died leaving a widow, and had died possessed of certain lands in northern Michigan. You know that up there, there is nothing but rock and occasionally a tree that has to fight for its life pretty hard; but it turned out that this land was valuable for its minerals, though it was not worth anything as land to cultivate. The Supreme Court of Michigan takes up the question of dower, and discusses all these authorities that I have seen and heard cited, and they go through the whole matter very thoroughly. They hold that the widow is entitled to be endowed with the land and the contents of the land—the proceeds of it, and they give her dower in that land and in the minerals in it. The syllabus is:

"Under Howell's Statutes, Section 5733, giving to the widow of every deceased person the use during her natural life of one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, a grant of dower in lands of her deceased husband, valuable solely as mineral lands, includes their use, and entitles her to her share of the proceeds of mining leases thereof, whether the mines were opened before or after the husband's death."

That is a wholesome doctrine and ought to be the doctrine in this country. If a wife helps a husband to accumulate property and get a farm, we see no reason why she ought not to have her share of the products of that land, whether it is from the surface, which may be very light, or from mines or mineral production under it which may be brought to the surface. However it is unnecessary to go to that length in the decision here. I will state in our judgment, the heirs having united in making this lease and providing for the production of the oil, and arranging as they did that it should be drawn as it was, that all this becomes a binding obligation, and whoever undertakes to take the assignment of that lease or of the products of the lease would be bound by the arrangement that had been made. In other words, we think that it was sufficient to give her a right to the use of the wells that may be sunk on the land—that were afterwards sunk—as dower, and it would be her's as rightfully as it would have been if the wells had been opened prior to the death of the husband. Now the ten acres having been assigned to her, we conclude that she had a right to the proceeds of these wells clearly, unless she has been barred by something that has been done since that time. The paper she signed, turning the property over to one son, was simply to make him an agent. He was an agent of these other parties. Nowhere is it shown that she had consented that the money might be turned over to anybody else than herself. It is true that she waited for some time, and the matter had been going on for three or four years, but she is an old lady, and perhaps was not very well advised as to her rights, and probably of not very strong executive ability, and she probably did not get stirred up sufficiently.

Now as regards this decree, I will read from the case of *Spoors v. Coen*, 44 Ohio St., page 497. In that case a petition was filed in the probate court to sell property to pay debts, and it appeared that Spoors had at some time conveyed the property to another Spoors, and it was claimed that he was old and infirm and was not competent to do that; that Spoors had conveyed to the widow two acres of land. The petition in that case set up that the widow was alive and was entitled to dower, and counsel for plaintiff filed on her behalf a waiver of her dower by

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metes and bounds, and consented to take it in money. The petition nowhere set up that there was any fraud as to her, or was any claim made as to her property other than she was entitled to dower interest in the land, and when they took a decree in the case, they decreed that her land should be sold; practically took it out from under her. The court say:

“But, had the probate court the same jurisdiction in such matters as the common pleas, it would avail nothing in this case, for the reason that no such jurisdiction was invoked by the petition of the administrators against Rhoda Spoor. There is no averment in the petition that any land had been fraudulently conveyed, mediately, or immediately to her. The only averment as to her is, that she is entitled to dower in the lands, for which an order of sale is asked; and the only relief asked as to her is that her dower may be set off and assigned therein. And, in the answer filed for her by the attorney of the administrator, she simply waives an assignment of dower in the lands and elects to take the same in money. It is by no means intended to question or impair the principle that when jurisdiction has been obtained over the subject matter of a cause, by a court competent to exercise it, its judgment, however erroneous, can not be questioned in a collateral proceeding. A judgment so rendered can only be set aside or questioned in a direct proceeding instituted for that purpose. This is familiar law (Freeman on Judgments, Section 135). But a judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing, and a judgment entered by a court of like jurisdiction in a case not before it, is another and different thing. In one case its judgment may be erroneous, in the other it is void. To bring a cause before a court competent to adjudicate it, it is not only necessary that the parties should be *in jus vocatio*, cited and summoned in manner required by the law of procedure, but a case must also be made, or stated affecting the party against whom relief is asked;”

and then, after discussing the case, they held this judgment was void.

We think that authority is still in binding force in the state of Ohio, and we think it clearly disposes of this question. It appears that this suit was brought for partition, and there never was a word said in it in regard to the right of this old lady to an interest in this lease, and an order for partition was

taken in the ordinary course, and the commissioners make the partition, the sheriff returning it, in which they set off in the usual and ordinary way ten acres of land, and then afterwards when the matter is confirmed, they undertake to make such disposition of it as will deprive her of her rights in the oil in this ten acres. We hold that this is *coram non judice*, and is void, and is not a bar to this woman's right to recover.

We hold that she is entitled to the product of these wells, and that she is not barred or estopped by this alleged judgment, and a decree may be taken in her favor.

James E. Wert and Baldwin & Harrington, for plaintiff.

James O. Troup, for defendants.

TITLE TO AND CONTROL OF STREETS BY MUNICIPALITIES.

[Circuit Court of Hamilton County.]

JOSEPH C. BUTLER ET AL V. THE CITY OF CINCINNATI ET AL.

Decided, February 26, 1904.

Streets—Title of Municipality Therein—Under the Modern Doctrine is a Title in Fee—A Qualified Fee, But Co-extensive with the Fee Title of the Abutting Owner—Such Owner Without Control Over—Can Not String Wires Over or Under at any Height or Depth—This Privilege Not Incident to Right of Ingress and Egress—Section 3471a Held Valid.

1. Under the modern doctrine a city owns its streets in fee—a fee qualified by the purposes for which the title has vested, but co-extensive with the fee title of the abutting owner.
2. The scope and extent of the purposes and uses of streets are to be defined by the municipality or the sovereign state, and not by the abutting property owner.
3. The General Assembly having prescribed by Section 3471a that the stringing of wires in the space between the street lines at any level above or below the surface can only be done by the consent and under the control of the municipality, and this inhibition being within the power of the state, an injunction will not lie against interference by a municipality with electric wires, which have been used for a period of two years for conveying a current from one building to another across an alley and at a depth of nineteen feet below the surface.

GIFFEN, J.

The plaintiffs seek to enjoin the defendants from cutting and removing certain wires maintained by the plaintiffs under and across Thorpe alley, at a depth of nineteen feet below the surface, for the purpose of supplying electricity to the premises of A. S. Taft from the premises of the plaintiff, each abutting upon said alley.

There is no substantial difference in the right of an abutting owner in the alley whether he or the city holds the title in fee. He has a property interest in the alley adjoining his lot which can not be taken against his will except upon the terms provided by the Constitution. *Callen v. Electric Light Co.*, 66 O. S., 166.

His essential right is an easement in the alley appendant and appurtenant to his lot for ingress and egress. This includes the right to convey by horse and wagon or other suitable means such materials as he may require for the use and occupancy of his premises; and so long as he does not interfere with the right of the city and the public to the free and uninterrupted use of the alley, they can not complain of the material thus conveyed nor of the means employed to accomplish it.

The wires are used to convey electricity from one to the other of the two abutting lots alternately. And while the mode of conveyance and the material carried are different in kind, they do not differ in principle, as applied to the right of ingress and egress, from the conveyance of coal and other materials by horse and wagon from one lot to the other for the purpose of generating electricity. The fixed and permanent nature of the conduit is no legal objection to its maintenance, unless it does now or probably will in the future materially interfere with the use of the alley by the public.

It is averred in the petition and not denied in the answer—

“That said wires are many feet below all water and gas pipes and all sewers and conduits which have been laid or will hereafter be laid in said alley. That said wires have been maintained under said alley for more than two years; that the maintenance of said wires in such place and at the great depth of nineteen feet has in no way interfered with the use of said

alley by the public or by the city of Cincinnati; that the continued maintenance of said wires at such depth can not at any time interfere with the use of said alley by the public or by the city or its board of public service or its successors, or any agent or officer of said city, for any municipal purposes or use whatever."

This being true, the plaintiffs, by maintaining the wires, are infringing upon no right of the city or of the public; but are exercising a right incident to their easement of ingress and egress.

If the doctrine contended for by the city is the law, then an abutting owner may not lay a pipe in the pavement to drain the water from his house to the gutter; nor excavate the ground under the pavement for purposes of storage; nor construct a bay-window that will project over the pavement, although nineteen feet above the surface of the ground, each of which obstructions would more likely interfere with the public use of the street or alley than an underground wire.

Every individual's property is subject to proper and reasonable police regulations, as was attempted by Section 3471a, Revised Statutes; but applied to the facts admitted by the pleadings in this case the inhibition of the statute is not only unreasonable, but, without just cause, deprives the abutting owner of land of a substantial property right.

JELKE, J.

I can not concur in the above conclusion for the following reasons:

The nature of the title of a municipality in its streets has been much in doubt until recently. The New York Elevated Railroad cases have defined this ownership, and the Supreme Court of Ohio has adopted the modern doctrine in this regard in the cases of *Callen v. Electric Light Company*, 66 O. S., 173, and *The Traction Company v. Parish*, 67 O. S., 190.

It is now settled that the city owns its streets in fee, not in fee simple, but has a base, qualified, or determinable fee. The qualification of such fee is that the city owns the land between

street lines in trust for street purposes. A "qualified fee" is defined by Blackstone—

"This estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee."

So long as the city maintains the purposes for which it is vested with title, this estate is a fee and as such co-extensive with a fee title in any owner of any other property.

This estate, of course, is subject to the property right of the owner of abutting property of ingress and egress. All property rights existent in the land between street lines and over and above the property rights or easement of the abutting property owner must follow the fee and belong to the municipality.

I agree that if plaintiffs' right to maintain the wire in question exists at all, it must subsist in being a part of the abutting property owners' right of ingress and egress. I do not think, however, that the establishment of a fixed wire is within this right of ingress and egress as those words are commonly understood. Bay, oriel windows, cellar extensions under the sidewalk, and gutter pipes, have in many instances been permitted to remain unchallenged. But they do not exist by virtue of any property right of the abutting property owner, but by the indulgence of the municipality.

I can not follow the case of *Henry v. The City of Cincinnati*, in THE OHIO LAW REPORTER of September 21, 1903, 1 Circuit Court—New Series, page 289, for the reason that I do not think that it recognizes what is now the accepted modern doctrine as to municipal ownership in streets.

Such being the estate of the city, if, however, the city's control is to be limited to street purposes, only the scope and extent of such uses are to be defined by the municipality or the sovereign state and not by the abutting property owner.

If the state sees fit, as it has done in Section 3471a, Revised Statutes, either for proprietary or police purposes, to declare that the stringing of wires in the space between street lines, no matter how high above or far below the surface, shall be

deemed within the city's property and jurisdiction, such declaration defines the city's occupation and makes the limit, always provided that it does not trespass upon the private property rights of the abutting owner.

"Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof."

It is extremely difficult to define exactly what shall be included within the abutting property owner's right of ingress and egress. All of the uses can not, with certainty, be enumerated, and there is no exact rule of law to determine just what uses are within and without such right. But it does not seem to me that the stringing of a permanent wire across the street or to the middle thereof to meet a wire from the other side of the street at any height above or depth below the surface, is within the meaning of these terms as they are understood, in dividing a piece of ground into streets and abutting lots.

As it is within the power of the city through the police department to remove anything improperly and illegally in the streets, I am of opinion that an injunction should be denied.

The two judges who sat at the hearing of this case, being unable to agree, as shown above, the same was submitted to Judge Swing, who is of opinion that Revised Statutes 3471a, controls, and that an injunction should not be granted.

The order of the court will therefore be that plaintiff's petition be dismissed.

Coffey, Mallon, Mills & Vordenberg, for plaintiffs.

Charles J. Hunt and Albert H. Morrill, contra.

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REWARD FOR ARREST OF CRIMINAL.

[Circuit Court of Sandusky County.]

ISAAC BROWN v. COMMISSIONERS OF SANDUSKY COUNTY.

Decided, January Term, 1903.

Reward—For Apprehension of One Accused of Crime—Offered Under Section 918—Not Payable to an Officer of the Law, When.

It is contrary to public policy and the law of this state, and generally of other states, that an officer be paid a reward for the performance of an act which his duty as such officer requires him to perform; and where a sheriff of a sister state arrests a fugitive from justice at the request of the sheriff of the county in this state where the crime was committed, and performs no other duty than to go to the place indicated and make the arrest and hold the accused until the arrival of an officer from this state to whom the accused is surrendered, such sheriff does no more than is strictly within the line of his duty, and is not entitled to any further compensation than the fees allowed by law, and can not recover from the commissioners of the county a reward offered by them under Section 918 for the arrest and conviction of such accused person.

HULL, J.; HAYNES, J., and PARKER, J., concur.

The plaintiff in error was also the plaintiff below. He was the sheriff of Kittitas county, in the state of Washington, and brought suit for \$1,000, which he claimed he was entitled to as a reward offered by the commissioners of Sandusky county for the arrest of a fugitive from justice. The case was tried to the court and jury and a verdict returned in favor of the defendants and judgment entered thereon. It is sought to reverse this judgment in this proceeding in error. The claim of the defendants is that Brown is not entitled to the reward, because whatever he did, he did as an officer of the law, as sheriff of the county of Kittitas, Washington; that he did nothing his duty did not require him to do, and that, therefore, he can not have nor claim any other compensation than his salary, or fees allowed him by law for such services. It is claimed by the plaintiff that the reward which was offered by the commissioners of Sandusky county, under Section 918, Revised Statutes, was a

general one, open to any one who might undertake to discover and arrest the fugitive, and if he succeeded, that he was entitled to the reward, although he may have been an officer of the law.

It appears that in 1896 Jacob Hess was murdered in Sandusky county by Louis Billow; that he fled from the county and state, and on December 23, 1896, the commissioners of the county passed this resolution:

“FREMONT, OHIO, December 23, 1896.

“Resolved, that we, the commissioners of Sandusky county, Ohio, offer a reward of one thousand dollars for the arrest and conviction of Louis Billow, under indictment for murder of Jacob Hess. All former offers of reward for said Louis Billow are hereby revoked.

“(Signed): HENRY HARMON,
“CHRISTIAN KISER,
“ELISHA HOFF,
“County Commissioners.”

This action was taken under Section 918, Revised Statutes, which provides:

“The county commissioners may, when they deem the same expedient, offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of a felony, and pay the same on the conviction of such person, together with all other necessary expenses, not otherwise provided for by law, incurred in making such detection or apprehension, out of the county treasury, and said commissioners may, when they deem the same expedient on the collection of a recognizance given and forfeited by such person, pay the reward so offered, or any part thereof, together with all other necessary expenses, and not otherwise provided for by law, incurred in making such detection or apprehension.”

The resolution, as has been stated, was passed in December, 1896. Nearly three years went by, and in July, 1899, Billow had not been detected or arrested. About that time information came to the sheriff of Sandusky county that he was in Kittitas county, in the state of Washington; and thereupon a letter was sent by the sheriff of Sandusky county to the sheriff of Kittitas county, addressing him as sheriff, not by name, and notifying him that Billow, charged with murder in the first degree, was

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in his county, and requesting him to arrest Billow, and hold him until an officer came from Sandusky county to bring him back to the state of Ohio. The letter was not produced at the trial, but according to the testimony of Deputy Sheriff Harris, of Sandusky county, this letter notified Brown that Billow was at a place called Easton, in his county. The sheriff is not clear that the letter notified him in what part of the county Billow was. In the letter of the sheriff was enclosed one of the cards which had been used by the officers of Sandusky county, in sending out notices of the reward. One side of the card was a picture of Billow and on the other side were the words:

“Arrest for murder, Louis Billow. Wanted in Fremont, Ohio; \$1,200 reward for his arrest and surrender. Thirty years old, five feet eight inches high, sandy complexion. Weight 155 pounds. Good picture on the other side.

“L. C. MCGORMLEY,
“*Sheriff Sandusky County, Fremont, Ohio.*”

Plaintiff, on receiving this letter and card, went to Easton in his county and found Billow in a saloon; arrested him and brought him to the county jail, and immediately notified the sheriff of Sandusky county that he had arrested the man and would hold him, or words to that effect; and the authorities of Sandusky county being satisfied that the man arrested was Billow, the sheriff sent his deputy, Harris, to the state of Washington to bring Billow back to Ohio. He took with him the necessary papers from the state of Ohio for the extradition of Billow. He found Billow in the custody of the plaintiff, as sheriff, and, after the proper proceedings had been had, with the deputy sheriff of Kittitas county, Washington, as his assistant, Harris brought Billow back to Fremont, and he was afterwards tried and convicted of murder in the first degree and, upon a recommendation of mercy by the jury, sentenced to the penitentiary for life. The deputy sheriff of Kittitas county, who came back with Harris, was paid his expenses and for his time in coming to Fremont. Afterwards he returned to Washington and came back to Fremont again to testify on the trial of the case and was paid for his time and expenses at that time by the county, these sums amounting in all to several hundred dollars. But

the commissioners refused to pay Brown the \$1,000 reward, or any part of it, and he brought his action to recover that amount.

It is claimed on the one hand, as I have said, that this reward as offered by the county commissioners, and as authorized to be offered by the statute, was open to any one who desired to avail himself of it, whatever official position he held. It is said there are no exceptions in the statute, but that the commissioners were authorized to offer such reward to any one, and that there are no exceptions in the resolution, and that, therefore, the plaintiff is entitled to avail himself of it and to recover.

On the other hand it is claimed by the defendants in error that it is contrary to law and to public policy to permit an officer to have a reward for performing such a service as this.

On the trial of the case certain statutes of the state of Washington were introduced in evidence. The testimony of Brown, who was not present at the trial, was offered in deposition. Deputy Sheriff Harris was called, and some other witnesses. The plaintiff did not testify in his deposition whether or not he had a warrant when he arrested Billow. But Harris testified that Brown told him that he did have a warrant; that he procured one before a justice of the peace, and with that in his hands made the arrest, and this was not denied. The court, in substance, charged the jury that if Brown performed these services in the arrest of Billow as an individual, he was entitled to recover, but that if he performed them as sheriff, and did only what he was required by law to do, he could not recover the reward, being entitled to no compensation for such services except his fees and salary. As the jury found against the plaintiff, we need not determine whether the law would permit him to claim the reward on the ground that he was acting as an individual, and not as an officer. But it is sufficient to say that we hold that under the testimony the jury were warranted in finding that the plaintiff was acting officially as sheriff, and that he procured a warrant, and acted under it and pursuant to it when he made the arrest.

In this state the law seems to be well settled that an officer, for the performance of services which it is his duty as such officer to perform, is not entitled to a reward; and that is held in most states. It is said by the court to be against public policy to permit an officer to accept any reward or compensation for such services, other than that given him by law; that it would lead to officers remaining idle and inactive, in the performance of their duties in matters of this kind until a reward was offered, and to other evils.

In a case decided by the Superior Court of Cincinnati, at General Term, in 1856, this question arose something as it does in this case, except that the reward in that case was offered by private citizens, and not by the public. The case is *Rea v. Smith*, 2 Han., 193. The plaintiff in the case was a sheriff of Indiana and had arrested a fugitive from justice from the state of Kentucky, and brought suit for a reward that was offered by private individuals. The opinion of the court was delivered by Judge Storer, the other judges being Spencer and Gholson. The court say in the syllabus:

"1. A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, can not claim any other or further remuneration for his services than the fees allowed by law.

"2. Whenever an officer makes an arrest, he is supposed to be acting in his official capacity; and where he performs the duty of sheriff, believing he was acting within the authority derived from law, the court will not allow him to change his relation and assume that of a private individual."

The court, in the opinion, say on pages 399, 400:

"Can a public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, claim any other or further remuneration for his services than the fees allowed by law?

"Our own Supreme Court, in *Gilmore v. Lewis*, 12 Ohio, 281, have authoritatively settled the question, and we would have been content to have referred only to the well considered opinion of Judge Wood, without any other examination of the law, did we not feel it to be our duty, when the obligations of ministerial officers, we fear, are not always clearly understood, and in many cases are but slightly regarded, to reaffirm what we

believe to be sound law and equally sound morality, and thus vindicate the principles by which official conduct should be regulated, and the oppression, under color of law, redressed.

"It is contended, however, that the plaintiff in error, though holding the office of sheriff when he made the arrest, acted as a private person; that it was not his duty to apprehend a fugitive from the justice of another state, and can not therefore be subjected to the rule we have indicated.

"On referring to the Revised Statutes of Indiana, Vol. 2, pages 10, 11, we find the sheriff is declared to be a 'conservator of the peace, and is bound to execute all process directed to him by legal authority, and pursue and commit to the jail of the county all felons.' The power thus conferred is certainly broad enough to authorize the apprehension of murderers or felons, whether the offense was committed in Indiana or Kentucky; and it is difficult for us to perceive how the duty could be denied by the officer in every proper case, whether the accused person was a fugitive or a domestic felon. An admission of the contrary doctrine would change the character of the sheriff from that of a high public functionary, to whom the largest powers have been confided for the preservation of the public peace and the protection of private right, to the passive condition of an agent, acting only as he may be directed by the magistrate or the court. We can not so regard the question. Whenever an officer has made an arrest he is presumed to have acted in his official character; and where, as in the present case, he performs the duty of a sheriff, believing he was acting within the authority he derived from the law, we can not permit him to change his relation as an officer, and assume that of a private individual. He might well have arrested without warrant, upon probable cause of suspicion, if the necessity of the case required it, and he would have been protected if the accused should afterward have been discharged."

The case of *Gilmore v. Lewis*, 12 Ohio, 281, is referred to by Judge Storer. The syllabus in that case says:

"A reward offered for the apprehension of a thief, and money, can not be claimed by a constable who arrests the thief by virtue of a warrant delivered to him for that purpose."

The court say in the opinion on page 286:

"But public officers, on whom the law casts this duty, from whom it requires exertion, and to whom it affords adequate compensation, occupy different ground."

And on page 287, referring to the claims of counsel for the constable:

“But it will be seen that his view of the case can by no means be sustained. It is not the case made by the declaration. The promise of the reward, as laid, is for the apprehension of the thief and money; and this arrest of the thief, and seizure of the money, are averred to have been made by the plaintiff by virtue of a warrant delivered to him as constable. The promise is therefore illegal and void. True, it is stated the plaintiff searched out the thief, and ascertained where the money was, and made oath on which the warrant issued; but for this service no promise of reward is laid. It is for the apprehension of the thief, and seizure of the money; and as this was done in virtue of his office, the plaintiff must be content with his legal fees, and the reflection that he has done the state some service.”

The question is discussed at some length in Throop on Public Officers, Section 485. The author says:

“It is evident from what has been heretofore said, that where a reward has been offered by the public authorities or by an individual, for a service which is within the line of the officer's duty, he can not claim the reward, although he may have performed the service.”

A case is cited from the Supreme Court of the United States, which seems to be contrary to these authorities and to the weight of authority as laid down by the courts of the different states (*United States v. Matthews*, 173 U. S., 381). By act of Congress the attorney-general was authorized to offer a reward. The syllabus is short, I will read it:

“The authority conferred upon the attorney-general by the act of March 3, 1891, c. 542, 26 Stat., 985, to offer rewards for the detection and prosecution of crimes against the United States, preliminary to the indictment, empowered him to authorize the marshal of the northern district of Florida to offer a reward for the arrest and delivery of a person accused of the committal of a crime against the United States in that district, the reward to be paid upon conviction; and a deputy marshal, who had complied with all the conditions of the offer and of the statute, was entitled to receive the amount of the reward offered.”

A majority of the court in this case held that the deputy marshal, having performed the service, was entitled to receive the reward. Two of the justices, Harlan and Peckham, dissented generally from the opinion of the majority "upon the ground, as stated on page 389, in the report," that—

"The offering or payment of a reward to a public officer, for the performance of what was at all events nothing more than his official duty, was against public policy, and the act of Congress authorizing the attorney-general to offer and pay rewards, did not include or authorize the offer or payment of any reward to a public officer under such circumstances."

Justice Brown concurred in the judgment, upon the ground, as stated by him, that the deputy marshal was not paid directly by the government of the United States, but was paid by the marshal himself, and therefore did not come within the general rule prohibiting an officer from receiving such reward.

It seems to us that the law of this state, and the law generally in other states, is against the proposition that an officer may receive a reward for the performance of an act that his duty as such officer requires him to perform. When this statute, Section 918, Revised Statutes, was passed by the Legislature, this was the general law of the land, as it is now. And when this resolution was adopted by the board of county commissioners of Sandusky county, there was impliedly excepted from its provisions officers who did nothing more than perform the duties of their offices.

The plaintiff had no knowledge that Billow was within his county or state until he was notified by the sheriff of Sandusky county. He had done nothing; had expended no time nor money in the work of detecting or apprehending Billow pursuant to this reward, and when he was advised by the sheriff of Sandusky county that Billow was within his county, and, according to the witness, Harris, notified at what point he would be found in his county, he simply, as sheriff of Kittitas county; Washington, went where Billow was and arrested him, and thereupon notified the authorities of Sandusky county that he had arrested Billow, and held him in custody until the officer came from Ohio to take him back to Sandusky county. Plaintiff

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stands no differently, it seems to us, than if the sheriff of Sandusky county, instead of writing to him, had sent an officer to Kittitas county, or had gone himself and verbally notified Sheriff Brown that Billow was at Easton in that county, and requested him to arrest him, as the sheriff of that county, whose duty it was to arrest all violators of the law, and to execute any warrant that was lawfully placed in his hands, and if pursuant to such request he had gone before a justice of the peace and had sworn out a warrant, and with that in his hand had arrested Billow and turned him over to the sheriff of Sandusky county. It would be contrary to the law of this state, as we understand it, and contrary to public policy, to hold that a sheriff for performing such a service might recover a reward of \$1,000 or any other sum. Brown acted entirely as an executive officer, strictly within the line of his duty as such officer. He performed no duty as a detective in ferreting out the criminal, or in ascertaining his whereabouts.

We are of the opinion that the judgment of the court of common pleas was right, and, therefore, it will be affirmed.

Kinney, O'Farrell & Rimelspach, for plaintiff in error.

George H. Withey, for defendants in error.

REFUSAL TO STOP ELECTRIC CARS AT DESIGNATED STOPPING PLACES.

[Circuit Court of Cuyahoga County.]

JOHN LOCKYEAR V. WILLIAM COVERT, MARSHAL OF THE VILLAGE OF EUCLID.

Decided, November 30, 1903.

Electric Cars—Power of Municipalities Under the Code—to Compel Cars to Stop on Signal.

A municipality is empowered by paragraph 9 Section VII of the Municipal Code to prescribe by ordinance that it shall be unlawful for those in charge of an electric car to fail or refuse to stop such car at any regular stopping place, when signalled so to do by persons desiring to board said car or to alight therefrom.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The plaintiff in this case files his petition setting out that he is now in the custody of the defendant as a prisoner; that the defendant holds him under a warrant of arrest issued by the mayor of the village of Euclid.

The offense charged against the plaintiff in the affidavit upon which the warrant was issued is a violation of Section 2 of an ordinance of said village passed September 28, 1903, which section reads:

"Section 2. It shall be unlawful for any person or persons in charge of any electric street car or cars running upon any street or avenue within the limits of said village of Euclid, to fail or refuse to stop such car or cars at any regular stopping place or places when signalled so to do by persons desiring to board said car or cars, or to alight therefrom."

The facts alleged in the affidavit are:

"That on or about the 9th day of November, A. D. 1903, at the village of Euclid, in said county and state (Cuyahoga county, Ohio), one John Lockyear, in the capacity of conductor, was in charge of the electric car then running within the limits of said village upon one of the public streets thereof, to-wit, Euclid avenue, so called; that at said time and place said John Lockyear was signalled to stop said car at a regular stopping place in said village, to-wit, stop No. 10, by said S. C. White, who desired to board said car, and that he, said Lockyear, then and there failed and refused to stop said car when signalled so to do by said White."

The allegation of the petition is that the section of the ordinance hereinbefore quoted is absolutely void for the want of authority on the part of said village council to pass the same.

When the case was presented to us in open court, it was stated by counsel for the plaintiff that the only purpose for the bringing of the action was to have an adjudication by this court upon the question of the authority of the Council to pass this second section of the ordinance. It was there stated that no question was made as to the formalities necessary to make the ordinance valid nor as to the sufficiency of the affidavit or warrant.

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Somewhat to our surprise a brief was filed by the plaintiff since the hearing of the case in open court, discussing other questions, but we regard them as wholly immaterial in determining the case now before us. We think a determination of the one question, which it is said was the only one sought to be made, is a complete determination of the rights of the plaintiff in this proceeding.

The only question necessary to consider in the case is whether under the statutes of the state, the council had authority to pass Section 2 of the ordinance under which the plaintiff was arrested.

Paragraph 9 of Section 7 of the Municipal Code, which is the section conferring powers upon municipalities, provides that the council shall have power—

“To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery-stable purposes; and to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways, and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation.”

It was conceded upon the hearing but that for this last clause “to regulate the speed of interurban, traction and street railway cars within the corporation” the council would have authority, under the earlier part of the section, to pass the ordinance in question. *Ravenna v. Penna. Co.*, 45 O. S., 118.

But it is said that this last clause clearly indicates that the authority is not given because the Legislature in express terms by this clause provides that the council may regulate the speed of these cars, and that this clause is entirely surplusage, if, by the earlier part of the section, the authority to require cars to stop at any fixed place or places is given. This contention is not sound. But for this last clause it might very well be claimed that the council would have no authority to fix a maximum rate of speed for cars passing through the municipality

upon railroads constructed upon their own private right of way, and for the purpose of giving such authority this clause may well have been added.

We hold that the municipality was authorized by the statute hereinbefore quoted to pass the section of the ordinance under consideration. The petition of the plaintiff is, therefore, dismissed, and he is remanded to the custody of the defendant.

Squire, Sanders & Dempsey, for plaintiff.

Kaiser & Cannon, for defendant.

BUILDING ASSOCIATIONS.

[Circuit Court of Hamilton County.]

MARTHA N. MILLER V. THE HIGHLAND AVENUE LOAN & BUILDING COMPANY OF CINCINNATI, OHIO.

Decided, January, 1904.

Foreclosure—Of a Building Association Mortgage—Form of Pleading—Permitting the Taking of Judgment for the Amount Which Has Become Due at the Time the Judgment is Entered.

In a suit by a building association to foreclose a mortgage where the prayer includes "that an account be taken," it is not necessary that a supplemental petition be filed in order that the judgment may be rendered for the amount due at the time the decree is entered, rather than the amount due at the time the petition was filed.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The original action in this case was commenced to foreclose two mortgages to the defendant loan and building company, the defeasance clause of each providing that if the mortgagor shall pay or cause to be paid to said company the dues, interest, premium and fines, the mortgage to be null and void.

The petition alleged that there was due on the first mortgage the sum of \$1,569.03, and upon the second mortgage the sum of \$1,998.70, making a total of \$3,567.73. The amount found due upon the mortgage was \$4,195. The proceeds of sale on the mortgaged premises amounted to \$3,740; after paying the taxes and costs, there remained of the proceeds \$3,206, which was applied on the indebtedness, leaving a balance due of \$940,

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for which judgment was rendered against the defendant below, Martha N. Miller.

It is claimed the court erred in rendering this judgment for the reason that it is in excess of the amount claimed to be due in the petition, and that no supplemental petition was filed setting up the additional amount.

It is not contended that the court could not have rendered the personal judgment for the amount claimed to be due under the prayer of the petition, which is as follows:

“Wherefore, plaintiff prays that the equity of redemption of the said defendant in said premises set forth in the first and second causes of action herein be foreclosed, that an account be taken, and that it may have judgment against said defendant, Martha N. Miller, for the amounts found due on its first and second causes of action respectively; that said premises therein described may be sold free of all claim of the defendants herein, and that the proceeds of said sale may be applied to the payment of the amounts due plaintiff, and for such other and further relief as is proper.”

But the claim is that there was no foundation in the petition for the judgment rendered. The loan and building company did not ask judgment for the amount due at the time of the filing of the petition, but prayed judgment for such amount as the court found to be due, and if the allegations of the petition authorized the court to find the amount due at the time of filing the petition, the same allegations as to interest, premium and fines, authorized the court to find the amount that had become due subsequent to the filing of the petition. And this is the meaning of the prayer that “an account may be taken”—that is, that the court ascertain from the facts stated in the petition the amount due at the time of the rendition of the judgment. It was therefore unnecessary to file a supplementary petition, no new facts had arisen, and every fact necessary to determine the amount that became due after the filing of the petition was averred. If authority was necessary, we think the case comes clearly within the case of *McHenry v. The Batavia Building & Loan Company*, 17th Circuit Court, 206.

Judgment affirmed.

Chas. B. Wilby, for plaintiff in error.

Harry R. Weber, contra.

TERMINATION OF POLICY OF BENEFICIAL INSURANCE.

[Circuit Court of Lucas County.]

BARBARA FOXHEVER v. THE ORDER OF THE RED CROSS ET AL.

Decided, October 26, 1901.

Insurance—In a Beneficial Order—Cancellation of the Policy in an Informal Way—Acquiescence of the Insured Therein—Right to Change Beneficiary Makes Policy a Part of the Insured's Estate—Members of the Order Not Within Section 5242 Barring Testimony of Adverse Parties—But Widow Within That Class.

1. Section 5242, providing that a party shall not be permitted to testify where the adverse party claims as heir, grantee, etc., renders incompetent the testimony of a widow who has sued a beneficial order upon a policy of insurance upon the life of her husband; but members of the order are not debarred by this statute from testifying as to matters occurring in the lodge room when the decedent was present.
2. Where the right exists in one insured in a beneficial order to change the beneficiary under his policy, such policy up to the time of his death constitutes a part of his estate. It follows therefore that admissions or declarations made by the insured and affecting the policy may be offered in evidence against the beneficiary in an action on the policy.
3. Failure by a beneficial order to observe the formalities perscribed by its constitution as to the suspension of members and cancellation of their policies, renders such action illegal; but a member who ceases after such action to pay his dues, or to attend the meetings of the order, or to recognize himself in any way as a member thereof, will be held as a matter of law to have acquiesced in the action taken.
4. In an action brought by the widow on a policy terminated in an irregular way, but in the cancellation of which the husband must be held to have acquiesced, it is not error to direct a verdict for the defendant order.

HAYNES, J.; PARKER, J., and HULL, J., concur.

A petition in error is filed here for the purpose of reversing the judgment of the court of common pleas in an action that was brought against the Order of the Red Cross et al by the plaintiff for a death loss.

George Foxhever, on September 3, 1888, had received from this order a certificate for the payment of \$1,000 upon his death,

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he directing that it should be paid to his wife. He continued to be a member of the order down to 1894, when some events occurred which, it is claimed, changed the conditions of affairs between him and the defendant, and by which he ceased to be a member of the order. Some eight or nine months after that he died, and subsequently his wife brought suit against this order for the recovery of this sum. Upon the trial of the case in the court of the common pleas, at the close of the testimony, the trial judge directed a verdict for the defendant company. In doing so he followed, as he states, the rulings of this court in the case of *Dimmer v. Catholic Knights*, 22 C. C., 366.

The testimony shows that Foxhever remained a member of the order until November, 1894. At that time it is claimed on behalf of the order that they had discovered that he had made a misrepresentation in regard to his age at the time he became a member of the order, he having stated at that time to be forty-nine years, when in fact, as the order claimed, he was fifty-nine years of age, the rules and regulations of the order prohibiting the taking of any person as a member of the order over fifty-one years of age. Upon the discovery of this fact, Mr. Foxhever being present at a meeting of the order (whether sent for or not does not clearly appear, but the testimony shows that he was present) his attention was called to it, and apparently for the purpose of taking some steps against him leading to his expulsion. It was stated to him that they desired to inquire into it, and he replied, according to the testimony of sundry witnesses, varying some in form or phraseology, but agreeing substantially in the main points, that he was "no chicken," and that they "might go to hell." They all agree on the last clause. That seemed to impress them very forcibly. And he turned and walked out of the room and never appeared there again.

Thereupon a resolution was offered and seconded and carried, and evidence was taken, upon which the order unanimously resolved to expel him for the reason that he had misled them and misrepresented his age at the time he became a member of the order. They directed the scribe, I think they call him, to notify Foxhever of the resolution that they had passed after he had left the room, and he accordingly addressed to him a postal card notice to his house.

Foxhever lived eight months after that, but paid no attention to the order. They sent him no notices, and he paid no dues, and made no inquiry; in fact he was utterly silent from that time forth until the time of his death. After his death, as I have said, the widow brought this suit.

By the terms of the constitution of the order the assured had the right to name the beneficiary under his certificate or policy, and he might change it from time to time as he saw fit. It remained under his control until he ceased to be a member, or until his death. Foxhever never made any change. The original order was payable to his wife, and he never made any change in regard to it.

Some of the questions that have been argued here are important and interesting, and we have discussed them at considerable length in our consultation room.

The first is as to the admission of testimony of members of the order who were present at the meeting of November 16 in regard to what transpired there and what was said. It is claimed that inasmuch at these members were liable to pay at each death a certain amount of money to make up the sum that was payable to the beneficiary, they were interested parties to the question; that as members of the corporation they were interested to the extent of their liability, at least to pay the amount of \$1,000 to this plaintiff. It is claimed that while they are not parties to the action, at the same time they come within that provision of the statute that provides that an interested party shall not testify, and that the spirit of the statute should be applied wherever the facts of the case require it. The plaintiff is Barbara Foxhever, and some question was made whether she comes within the clause of the statute (Section 5242, Revised Statutes) that provides that the defendant shall not be permitted to testify where the opposite party claims by or through a deceased person. We are of the opinion that she does come within that classification, because she takes under this certificate by the appointment of the husband, by his authority and by his right as a member of the order, and that it may, therefore, properly be said that she claims by or through her husband.

So far as the right of these other persons to testify is concerned, the question is interesting, and is one that has never been passed upon by the Supreme Court of the state. Indeed it is not very often raised. The only time we have had any question like it come up was when objection was made to the officers of a corporation testifying in regard to a contract that had been entered into with a deceased person, the suit being brought by the administrator, and in that case we refused to allow the officers of the corporation to testify, holding, in effect, that they were the real parties in interest, the persons who had made the contract and were interested; that they were members of a corporation doing business, of course, under a name that the statute permitted them to assume, and under which they could be sued and could sue by; but inasmuch as they were the persons who had made the contract, that they ought not to testify, the lips of the other party being silenced by death. That is as far as we have gone, and that is as far, as at present advised, we think we ought to go. We are of the opinion that the interest these parties had in this matter ought not to prevent the members of that body from testifying as to matters that occurred within the lodge room at the time that the deceased was present and with the deceased.

This society was made up of persons who gave very little attention, apparently, to the orderly conduct of their business. Perhaps they are engaged in vocations and duties that led them to be loose in methods of business. There are rules adopted by the body which govern it, and these rules provide for the manner in which a person may be expelled for violation of rules of order, or for a misstatement of his age in becoming a member of the order:

“Section 86. * * * Members who shall be found guilty of knowingly obtaining membership in this order through fraud, such as concealing age, or any bodily or mental infirmity which would debar them if known, or of falsely answering questions on their medical examination, shall upon conviction thereof be suspended from the order and shall not be reinstated or again received as members. Any member charged as above shall be entitled to a fair and impartial trial.

"Section 89. Any member shall be entitled to a fair trial for any offense involving fine, reprimand or suspension (except for non-payment of dues, death assessment, and for gross offenses committed in open commandery). No member shall be put upon trial unless charges, duly specifying the offense, so as to fully apprise them of the nature thereof, and enable them to prepare for defense, shall be submitted to the commandery in writing, signed by a member of the order. Such charges shall be referred to a trial committee of three members. And in case such committee or any member of it shall be challenged for cause, such challenge shall be tried by commandery, and if the challenge is sustained another member shall be appointed to act in his place," etc.

They are to keep minutes, report to the commander, and the commandery are to decide upon the charges. The same section provides:

"If the accused refuse or neglect to stand trial when personally summoned, the committee shall report him or her guilty of contempt of the commandery, which report shall be conclusive as to guilt, and the penalty shall be at once fixed by the commandery, which shall take effect at the expiration of two weeks, unless an excuse is tendered for such absence which shall be satisfactory to the commandery."

It will be observed, as I have stated, that this proceeding was not gone through with. The trial court held that the proper proceedings had not been taken to expel him, but that under the decision in *Dimmer v. Catholic Knights of America*, 22 C. C., 306, the question would properly arise as to whether or not, under the law of the land and upon the facts of the case, he had not acquiesced in his expulsion, although it was not properly made, and whether or no he did not cease to be a member of the order.

There is another question that arises in the case. It will be observed that the lodge did act upon the statement made by the accused at the time that he was spoken to by the commander at this meeting on November 24. They took it practically as a confession, an admission that he did misstate his age at the time of obtaining his certificate. The question arises as to whether, if that were true, if he did admit that fact, that that could or should affect the rights of his wife—whether, in short,

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his admissions in her absence could cut off her rights. Cases were cited (and I suppose there can be no question as to the law) where a policy of insurance is issued in the ordinary form, even although it be made with the wife as beneficiary, for the wife to be paid a certain sum upon the death of her husband, that she has a right in that policy which can not be cut off by the admissions of the husband; but it is claimed that this class of policies stand on an entirely different ground; that by the terms, as I have stated, of the constitution, the husband in this case has a right to change the beneficiary and name some other person at any time he sees fit to do so, and his right to do so has been recognized by the Supreme Court of Ohio, although he must do it in pursuance of the constitution and by-laws of the order. There are a variety of decisions in the United States upon this question. We are cited by counsel to Niblack Benefit Societies, Section 377, and to Beache Benevolent Societies, Section 460. In Niblack there are some reference to cases, one in Indiana, in which it was held that the admissions of the husband could not be received to cut off the wife's rights, and in another state (Illinois) it was held that they could be; the line of argument in Indiana being that while the husband had the right, he had not exercised it during his lifetime, and, therefore, the right remained in the wife, and so long as he had failed to exercise and change it, that any admission that he might have made affecting the policy could not cut off her right. In Illinois the court held that so long as he had the right, as he did, to at any time change the name of the beneficiary under the policy, that the policy remained as his—part of his estate, his property, his to do with as he chose,—and for that reason any admissions, or declarations, or statements he might make affecting that policy during the time that he so held it (of course, being during his lifetime) might be offered in evidence as against the beneficiary under the policy. We are inclined to think, and we will so hold in this case, that the latter view is the correct one, and that the declarations made by Foxhever during his lifetime might be received in evidence for the purpose of affecting the validity of the policy.

Such being the condition and position of affairs, did the court err in directing a verdict by the jury for the defendants? As I have stated, this declaration was made, which I will not repeat, in the presence of the lodge. From that time forth he never recognized the lodge in any manner or form, by any payment of dues, or anything else. It seems to us that that act was a clear and well defined admission that the charge that was made against him by the commander at that time was true: that he had made a false statement at the time that he became a member; and then he used very abusive language towards the lodge and the person charging him with the offense. It seems to us that that is a very full and complete confession of the charge which was made against him. He ceased from that time forth, as I have said, to make any demand of the lodge, to go near the lodge, to ask for any explanation about any dues, or to in any manner or form recognize himself as a member of the lodge, up to the time of his death. And we think under the rules that were laid down by this court in *Dimmer v. Catholic Knights, supra*, which were, as we think, sustained by authority, in which case a very full opinion was delivered by Judge Hull, with a citation of the authorities, that the court was authorized, upon the admitted facts of the case, to direct a verdict in favor of the defendants.

We have therefore concluded, upon a careful investigation of the case, that the judgment of the court of common pleas ought to be affirmed, and it is so ordered.

O. S. Brumback and *C. A. Thatcher*, for plaintiff in error.

Kohn & Northrup, for defendants in error.

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FRAUDULENT TRANSFER OF SECURITIES BY AN INSOLVENT CORPORATION.

[Circuit Court of Cuyahoga County.]

W. D. SAYLE, RECEIVER OF THE SUPERIOR STREET SAVINGS & BANKING COMPANY, v. THE GUARANTEE SAVINGS & LOAN COMPANY ET AL.

Decided, November 23, 1903.

Receiver—Of Insolvent Corporation—Has the Same Power to Maintain Suit—Accorded to a Receiver of a Dissolved Corporation—May Sue in His Own Name—Transfer of Securities by an Insolvent Corporation—Fraudulent as to Creditors—The Law of Corporations.

1. A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and the recovery of possession thereof, and he may maintain such an action in his own name; all the authority in that behalf accorded to a receiver of a dissolved corporation is possessed by a receiver of an insolvent corporation.
2. A transfer of securities by an insolvent corporation is fraudulent as to its creditors, when the fact of insolvency was known to the manager who made the transfer for the corporation, and the said manager also had knowledge that the claim, in satisfaction of which the transfer was made, was fraudulent.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Appeal by J. B. Livingston and F. L. Taft, trustees.

The plaintiff in this action was appointed by the Court of Common Pleas of Cuyahoga County and duly qualified as receiver of all of the assets and property of The Superior St. Savings & Banking Company, which is a corporation organized under R. S. Section 3797, in an action brought against said savings and banking company by a creditor of said company.

By the order appointing such receiver he was authorized in express terms "to bring all suits necessary in any court having jurisdiction thereof, for the collecting of debts and the prosecution of any suits or the defense of the same as may be necessary in the proper discharge of his duties herein." This appointment was made on the 23d day of August, 1901.

The defendant, The Guarantee Savings & Loan Company, is a corporation organized under R. S. Sec. 3836-1.

Subsequent to the bringing of the present action, by proceedings properly had in the Supreme Court of Ohio to oust the said savings and loan company from its franchise and wind up its business, the defendants, Frederick A. Taft and J. B. Livingston, were appointed and qualified as trustees of the property of said loan company.

Prior to the appointment of the plaintiff as receiver as hereinbefore set out, to-wit, on the 14th day of August, 1901, The Guarantee Savings & Loan Company, hereinafter called the loan company, brought two suits against The Superior St. Savings & Banking Company, hereinafter called the banking company, in the court of common pleas of this county. In each of said actions the said loan company caused a writ of attachment to be issued against the said banking company, commanding the sheriff to levy upon all the assets of said banking company. No bond was given for such attachment in either of said actions, but assurance was given to the clerk that proper bond would be given. The writs were issued, the levy made and a keeper put into the possession of the property of the banking company at its bank.

The first of these two suits was brought upon two certified checks of the banking company, each of which checks was for \$11,000, and purported to be signed by one W. E. Cunningham, and made payable to the order of J. A. Blodt, who was the secretary and general manager of said loan company, and which by said Blodt had been endorsed to said loan company. Said checks each bear date August 7, 1901. The certification of these checks purported to be made by the said banking company and was signed by Frank S. Miller, who was the secretary of the said banking company.

The other suit was for the sum of \$50,834.35, claimed to be due to the said loan company on an open account for deposits made by it with the said banking company.

Immediately upon the levy of those attachments the said banking company through its said secretary, Miller, and its president, ——— Tait, had a meeting with the said Blodt

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and others representing the said loan company, and effected a settlement of the two suits, by which the said banking company gave to the said loan company its note for \$17,925, to secure the payment of which the said banking company then delivered to the said loan company as collateral securities a considerable amount of commercial paper and other securities, all set out and named in the petition herein.

The present suit is brought to set aside this transfer of securities and to recover possession of the same by the plaintiff. In his petition the plaintiff alleges that such securities were obtained by the said loan company in fraud of the said banking company, and especially in fraud of the creditors of said banking company, it being alleged that said banking company, at the time of the transfer of said securities to said loan company, was hopelessly insolvent and was indebted to a large number of creditors and in a large amount. The facts constituting such fraud claimed by the plaintiff are set out fully in the petition. These facts as established by the evidence we find to be:

Neither of the two checks hereinbefore mentioned were ever signed by the said W. E. Cunningham. That fact was well known to the said Miller at the time he certified they were good, as secretary of said banking company, and was also known to the said Blodt when he accepted them. There was no indebtedness of the said banking company to the said loan company or to the said Blodt represented by or justifying the giving of any such checks to the said loan company. The entire transaction of the making of such checks, to which in fact the name of Cunningham was forged, was a scheme got up between Miller and Blodt for the purpose of making it appear that the said loan company had assets which in fact it did not have, and the only thing which the said banking company received for said checks was the notes of the said Blodt, who was hopelessly insolvent, and well known to the said Miller to be thus hopelessly insolvent, and the transfer to said banking company of certain stocks and obligations by the said Blodt which were known by the said Miller and the said Blodt to be valueless.

The other suit brought by the loan company against the banking company was equally without foundation. The ap-

parent indebtedness of the banking company to the loan company on its books, appearing to be for deposits made by the loan company with the banking company, represented no money actually deposited, but only notes given either by Blodt in his own name or by him in the name of the loan company. The entire plan of making it appear that the banking company was indebted to the loan company was a fraudulent scheme devised by Blodt and Miller for the purpose of making fictitious assets for the loan company that it might be able to pass the examination made by the state officers whose duty it was to make investigation of the affairs of the loan company, and the suits were brought at the instigation of these state officers, who insisted that these apparent assets of the loan company must be converted into money. When the settlement of these suits was made, Miller, as well as Blodt, as has already been said, had full knowledge of the groundlessness of these claims. Tait, the president of the banking company, gave practically no attention to the business of the bank but left its management almost exclusively to Miller. When the agreement to settle the suits was made Tait was without knowledge of the fraudulent character of these claims, though before the actual transfer of the securities was made he may have had knowledge of the fact that these checks were given and certified without proper consideration. As we view the case, however, it is immaterial whether Tait had such knowledge or not. If he and the officers of the banking company other than Miller were without knowledge of the fraudulent character of the claim, the question might arise in a proper case whether the banking company could maintain an action to set aside this transfer of securities, but that question need not here be determined.

It is urged on the part of the defendant that this action could not be maintained by the plaintiff unless it is such an one as could have been maintained by the banking company itself. We hold this claim not to be well founded. It is true that no statute in Ohio in terms authorizes the bringing of such action by the receiver. Section 6343 provides that such an action may be brought by a creditor and by an assignee; and Section 6140

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provides for the bringing of such action by an executor or administrator.

Prior to the enactment of this last section it had been held in the case of *Benjamin v. Le Baron's Administrator*, 15 Ohio, 518, that such action could not be maintained by an administrator. The reason for the holding is that the administrator or executor is the personal representative of the decedent or testator, and, therefore, without special authority he could bring no action which he, whom such executor or administrator represents, could not have brought. In this case, it is true the suit was for the recovery of personal property, as in the case under consideration. On page 526 this language is used by Judge Read in the opinion:

"We hold that the administrator can only maintain such action as the intestate might, if living. He represents the intestate; he steps into no other right. As between the fraudulent vendor and vendee, the transfer is good. Such conveyances are void only as to creditors. This is the well-settled doctrine in Ohio. Hence, as between the vendor and vendee in this case, the vendor had no rights, and of course his administrator could have none."

It is well settled that one who conveys his property away for the purpose of defrauding his creditors, can not maintain an action to have the property conveyed back to him, because, being guilty of a fraud in thus transferring his property, he must abide the consequences of such fraud. The executor or administrator is not a representative of the creditors of the decedent, but of the heirs and legatees, and they are entitled to no greater rights than the decedent himself. A receiver, however, is the representative of the creditors. The property is placed in his hands that it may be preserved and distributed to the creditors. The statute, as has already been said, provides for the bringing of such an action by the assignee, who is no more the representative of the creditors than is the receiver, yet the claim is not without force that since the one is named in the statute and the other is not, that the statute meant to make a distinction between them as to the right to bring a suit. No good reason seems to exist why the representative of the creditors,

by whatever name he is designated, should not have the right to bring such suit as the creditor himself might bring.

In the case of *Monitor Furnace Co. et al v. Isaac Peters et al*, 40 O. S., 575, it is held that it is the duty of a receiver who was appointed for a dissolved and insolvent corporation to bring suit to set aside conveyances fraudulently made. The language used by Judge Nash in the opinion, on page 583, is:

“It is the right and duty of the receiver of a dissolved and insolvent corporation to pursue after and recover property which has been fraudulently conveyed before the dissolution.”

To the same effect is the case of *The Smead Foundry Co. v. Chesbrough*, 16 Cir. Ct. Reports, 783.

It is urged, however, that these cases differ from the one at bar in that the receiver in each of these cases was for a dissolved corporation appointed under R. S. Section 5587, and that his powers are found in R. S. Section 5590. Section 5587, paragraph 5, provides in what cases receivers may be appointed, in the following language:

“In the cases provided in this title, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.”

And Section 5590 provides:

“The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect, compound for, and compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize.”

Paragraph 6 of Section 5587 provides for the appointment of receivers in all other cases where receivers have heretofore been appointed by the usages of equity.

The receiver in *this* case was appointed for an insolvent corporation. By the usages of equity receivers have been so appointed time out of mind, so that it would seem that whatever

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actions a receiver appointed for a dissolved corporation might bring *this* receiver might bring.

In *Whittlesey v. Delaney*, 73 N. Y., 571, the first paragraph of the syllabus reads:

“An action to set aside and vacate a judgment against a corporation on the ground that it was obtained without consideration, by collusion with the officers of the corporation, and in fraud of creditors, may properly be brought in the name of and by a receiver of the corporation.”

In Section 72 of Smith on Receiverships, this language is used:

“The power of the receiver to sue in his own name has been recognized however where the order of court so directs, or the statute so authorizes. But in the absence of such power he must sue in the name of the person or corporation over whose property he is appointed. * * *

“Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real party in interest.”

We are aware that many cases are reported which hold that a receiver in a case like this can not maintain the action in his own name. We hold, however, that this action can be so maintained. We see no reason why a receiver appointed for a dissolved corporation may under our statutes bring such action unless the receiver of an insolvent corporation may also maintain the action.

This brings us to a consideration of the question whether under the facts in this case the transfer of the securities made by the banking company to the loan company upon the settlement of the suits brought by the latter against the former, was fraudulent as to creditors of the banking company. That the latter was insolvent at the time of the transfer can not be doubted; that such insolvency was known to Miller, the manager, is equally certain; that Miller knew that there was no just claim upon the certified checks and upon the greater part of the open account is absolutely certain. The reason why he should be in a hurry to settle these cases is not difficult to find.

He had committed a wrong which might very probably subject him to a criminal prosecution, and he was, of course, anxious to get into his hands these checks which he had certified and which, though purporting to be drawn by Cunningham, he knew were never signed by him. The evidence shows that immediately upon getting these checks into his hands, he did what he might very naturally be expected to do, destroy them.

As to the bank account, as has already been said, the greater part of it was made up of an apparent indebtedness to the loan company which in fact only existed because of notes which Blodt had given, he being, as Miller doubtless knew, entirely without security other than absolutely worthless collaterals.

Without going further into a discussion of the facts in the case, we hold that the plaintiff is entitled to have the securities which he seeks transferred to him upon his transferring to the trustees of the loan company the collaterals which he by his petition tenders to them. A decree may be drawn accordingly. As to the further judgment in the case, it will be as the judgment was in the court of common pleas.

Carpenter, Young & Stocker, for plaintiff.

Smith & Taft, for defendants.

**ONE INDICTED FOR ROBBERY MAY BE CONVICTED OF
POCKET PICKING.**

[Circuit Court of Lucas County.]

HARRY BROWN V. STATE OF OHIO.*

Decided, March 13, 1903.

Criminal Law—Statutes Based Upon the Doctrine of, Included Offenses Constitutional—Degrees of Crime—Pocket Picking Included in Charge of Robbery—Notice to the Accused of Crime Charged—Cross-Petition in Error by the State Necessary, When—Sections 6818 and 7316.

1. The constitutionality of statutes permitting a jury to convict of an offense not charged in the indictment, but which is of a lower or inferior degree is well established.
2. It is not necessary that crimes should be divided into degrees in order that they may come within a statute, such as Section 7316, authorizing a jury to find the defendant guilty of an attempt to commit the offense charged in the indictment; and inasmuch as the offense of pocket picking is the same as that of robbery, except that it lacks the ingredient of force or violence or putting in fear, and one indicted for robbery can be convicted of pocket picking.
3. A defendant indicted for robbery and convicted of pocket picking can not complain that he was not notified of the charge against him in the indictment.
4. A reviewing court can not consider a complaint by the State that the trial judge erred in taking from the jury the question of a defendant's guilt of the crime of robbery, and the permitting of a verdict to be returned of guilty of pocket picking, where no cross-petition in error has been filed by the State.

HULL, J.; HAYNES, J., and PARKER, J., concur.

The plaintiff in error was indicted by the grand jury of this county for the crime of robbery, and was put on trial. At the conclusion of the State's testimony his counsel made a motion that the jury be instructed to return a verdict of not guilty, for the reason that the State's evidence had failed to establish the crime of robbery, in that violence, or force or putting in

* Motion for leave to file a petition in error overruled by the Supreme Court.

fear had not been established by the evidence. The court held, upon this motion, that the State had failed in this respect to establish the crime of robbery, but that there was included within the offense of robbery the crime of pocket picking, and overruled the motion. No evidence was offered by the defense, and the court submitted to the jury the question as to whether the defendant was guilty of pocket picking. The defendant was found guilty by the jury of that crime and sentenced to the penitentiary. It is to reverse that judgment that a petition in error was filed in this court.

It is claimed by the plaintiff in error that under the indictment charging him with robbery he could not be convicted of the crime of pocket picking, as it is called in the statute; that this is another and a separate and distinct offense, described in the statute, and that before the defendant could be put upon trial or convicted of it he must be indicted for that offense, either by a separate indictment or by a separate count in the indictment; and that the court therefore erred in submitting the question to the jury as to his guilt of pocket picking. It is claimed that the defendant should have been discharged.

The jury were instructed by the court to return a verdict of not guilty as to the crime of robbery, which was done, and a verdict of guilty returned as to the offense of pocket picking.

The question raised is whether the offense of pocket picking is so included within the offense of robbery as to come within Section 7316, Revised Statutes, which provides for the conviction of an attempt to commit a crime and for the conviction of a crime of a lower degree where the evidence is insufficient to warrant the jury in convicting of the degree charged in the indictment.

The statute under which the defendant was indicted and prosecuted is Section 6818, Revised Statutes, which provides that:

“Whoever by force or violence or by putting in fear, steals and takes from the person of another anything of value, is guilty of robbery, and shall be imprisoned in the penitentiary not more than fifteen nor less than one year; and whoever otherwise than by force and violence or by putting in fear, steals and takes from the person of another anything of value

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shall be deemed guilty of pocket picking, and shall be imprisoned in the penitentiary not exceeding five years nor less than one year."

As I have said, the defendant, Brown, was indicted under the first part of the statute, charging him with robbery. There was no count charging him with pocket picking.

It is claimed by the State that the defendant was properly convicted of pocket picking under Section 7316, Revised Statutes, which provides as follows:

"Upon any indictment the jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit the same, if such attempt is an offense; when the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any inferior degree; and if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly."

It is claimed by the State that the charge of robbery, as contained in the indictments, includes the offense of pocket picking; that the offense of pocket picking is an offense of a degree inferior to that of robbery. It is claimed that robbery contains all of the ingredients or essentials of pocket picking and one additional ingredient, to-wit, force or putting in fear, and that they differ only in that respect. On the other hand it is claimed by the plaintiff in error that they are two separate and distinct offenses.

The doctrine of included offenses was recognized by the law before the passage of this statute. It was a part of the common law of the land that a defendant might be convicted of an offense of a less degree than the one with which he was charged, if the one was properly included in the other. So this statute is in a sense only declaratory of the law as it stood before its enactment. In *Stewart v. State*, 5 Ohio, 241, it is stated in the syllabus:

"Indictment for assault with intent to kill, party may be convicted of assault and battery, or assault alone."

Judge Lane, delivering the opinion of the court, on page 242 said:

"It is assigned for error that the court refused to charge the jury that in an indictment for an assault with intent to kill they might find him guilty of simple assault and battery, without any such intention; and in charging that in this case, if the jury found him guilty at all, it must be guilty of the whole accusation.

"A doubt has been raised whether the bill of exceptions is taken to the refusal to charge, as well as to the actual charge; but a majority of the court believe it is, although somewhat informal, sufficiently applicable to both.

"We are all of opinion that the charge was erroneous; that a jury may find a verdict of guilty for part, and acquit for the residue; that where an accusation for a crime of a higher nature includes an offense of a lower degree, the jury may acquit him for the graver offense and return him guilty of the least atrocious. The cases and examples are collected in 1 Ch. Cr. Law, 638, and there is no foundation in this country for the distinction made in England on this point between felonies and misdemeanors; for here an indictment for the higher offense rather adds to than subtracts from his privileges.

"Still we can not say that the defendant might not be prejudiced by his instruction, and therefore the judgment must be reversed."

This question of included offenses is discussed in 1 Bishop Cr. Law:

"Sec. 794. Where offenses are included one within another, as before explained, a person indicted for a higher one may be convicted of any below it not merged in that for which he is indicted, unless the allegation should happen to be in a form not charging the lower."

"Sec. 1054. Where crimes are so included within one another that a higher comprehends whatever a lower one does and more, as previously explained, a conviction for any higher one bars a prosecution for any lower; since, if the defendant is guilty of all, he is necessarily so of each particular part. It is believed that there is no exception to this rule. In general, the same consequence follows an acquittal; because generally there can be a conviction for the lower on an indictment for the higher. But the effect of an acquittal is not like that of a conviction, universally so."

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"Sec. 1055. * * * Robbery and larceny, being both felonies, and the latter included in the former, an acquittal for robbery will bar an indictment for the larceny of the same things. And equally an acquittal for the larceny will bar the robbery indictment."

The doctrine of included offenses and the constitutionality of statutes permitting a jury to convict of an offense not charged in the indictment but which is one of a lower or inferior degree and included in the greater, seem to be well established by the authorities; but it is claimed here that the offense of which Brown was convicted is not properly one of a degree inferior to and lower than the one charged in the indictment. It is said there are no degrees of robbery in this state; the crime is not divided into degrees—first, second, and otherwise, as is the crime of homicide. The elements of robbery, the ingredients, are laid down by the Supreme Court in *Matthews v. State*, 4 Ohio St., 539, 540, where it was said in the syllabus:

"It is essential that an indictment for robbery should contain a substantial averment of the intent to steal and rob."

On page 541 of the opinion Judge Bartley, in the opinion, said:

"Three ingredients are essential to constitute the crime of robbery:

"1. The use of force and violence, or the use of means whereby the injured person is put to fear.

"2. A taking from the person of another of money, or other personal property.

"3. An intent to rob or steal."

The crime of robbery, then, consists in taking from the person of another, with force or violence, or by means whereby the injured person is put in fear, money or other thing of value, and this must be accompanied with an intent to steal; and if any one of these ingredients is lacking, the crime of robbery does not exist.

Formerly the crime of pocket picking was not known to the law as a separate and distinct offense, and if a man was indicted for the crime of robbery, and any one of the elements

necessary was lacking, he could not be convicted of the crime of robbery, and he could only be convicted, if at all, of the offense of larceny. This statute (Section 6818, Revised Statutes), however, provides for the additional offense of pocket picking as follows:

"And whoever otherwise than by force and violence, or by putting in fear, shall steal and take from the person of another anything of value, * * * shall be deemed guilty of pocket picking, and shall be imprisoned in the penitentiary not exceeding five years," etc.

So that the offense of pocket picking is the same as that of robbery, except that it lacks one ingredient, to-wit, that of force and violence or putting in fear. The crime of robbery, as defined by the statute, exists whenever one by force or violence or putting in fear steals and takes from the person of another anything of value. The amendment to the statute defining the crime of pocket picking was intended to cover the case of larceny from the person where the element of force and violence or putting in fear was lacking, and to make that offense a felony or penitentiary offense, instead of a mere larceny.

It is not necessary that crimes should be divided into degrees, in order that they may come within a statute, such as Section 7316, Revised Statutes. Where one crime is of a more atrocious or heinous character than another, if one is properly included within the other, then the one may be said to be of a higher degree than the other, as larceny is included, or may be included, if property is taken, in the crime of burglary. Assault and battery is included in the crime of robbery, and one may be convicted of assault and battery who is indicted for robbery. It has been held in *People v. Jones*, 53 Cal., 58, that robbery includes larceny. The syllabus of the case is:

"The crime of robbery includes that of larceny, and under an indictment for the first offense the jury may find the defendant guilty of larceny, if they entertain a reasonable doubt as to which of the two offenses he was guilty of."

In the opinion the court say:

"It is obvious from the foregoing definition that an indict-

ment for robbery must aver every fact necessary to constitute larceny, and more.

"The jury may find a defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. And as there was some evidence tending to show that the crime was merely larceny, the defendant had the right to insist on the instruction he requested the court to give."

In *Commonwealth v. Prewitt*, 82 Ky., 240, the syllabus contains this:

"Under an indictment for robbery the court erred in refusing to instruct the jury that the defendant might be convicted for simple larceny. Robbery being a higher grade of crime than larceny, under the criminal code, the former includes the latter."

The court in the opinion say:

"The code provides, Section 262, 'upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment.'"

On page 241, of the opinion, the court say:

"Our statutes do not undertake to define either robbery or larceny. For their meaning we must have recourse to the common law. Blackstone defines robbery to the felonious and forcible taking from the person of another of goods or money of any value, by violence or putting him in fear. This is designated as mixed or compound larceny. Simple larceny is the felonious taking and carrying away of the personal goods of another. Choses in action, such as bonds, bills and notes, not importing any property in possession, were held not to be the subject of larceny. Hence our statutes making the taking of such thing larceny. The principal ingredient in each is the taking of the personal goods of another, without his consent, and with the intention on the part of the one taking to convert them to his own use. Larceny is the generic term, robbery being specific and of a higher grade than simple larceny because of the element of force or fear entering into it; larceny is of a lower degree of the same offense as that charged in the indictment, and, therefore, punishable under the code, as quoted. The court below erred in not instructing the jury that under

the indictment for robbery a conviction for simple larceny might be had."

In *State v. Graff*, 66 Ia., 482 (24 N. W. Rep., 6), the court hold, as stated in the syllabus, as follows:

"The crime of robbery (Code, Section 3858) includes the crime of larceny from the person (Code, Section 3905). Accordingly, an indictment for larceny from the person is sustained by evidence which establishes the crime of robbery."

The defendant complained in this case that if he was guilty of anything he was guilty of robbery, and the evidence showed that he was guilty of that; but the court say on page 483:

"All that can be claimed is that while the evidence established all the elements of the crime charged in the indictment, it proved one fact in addition thereto, and would have warranted a conviction of another offense if defendant had been accused of that offense. But this affords no ground for arresting judgment on the verdict. The court is warranted in pronouncing judgment on the verdict of guilty in any case in which the proof establishes all the elements of the crime charged in the indictment."

In *Stevens v. State*, 19 Neb., 647 (28 N. W. Rep., 304), the fourth paragraph of the syllabus is as follows:

"A person charged in an information with robbery may be convicted of larceny, as the greater includes the less offense."

And this is discussed in the opinion. The court say on page 650:

"Objection is made that the court did not instruct the jury that they could find the plaintiff guilty of larceny, if the proof failed to show sufficient violence of putting in fear to constitute robbery. There is no doubt that a trial and acquittal for robbery is a bar to an indictment for larceny, when the property alleged to have been taken is the same (*The People v. McGowan*, 17 Wend., 386). In this case it is said by Cowen, J., speaking for the court: 'The first indictment, though for robbery, involved the question of simple larceny, of which the person under that indictment might have been convicted.' This is upon the principle that where several crimes are included, one within the other, a conviction of the higher bars a prosecution for any lower, since the greater includes the less."

In 1 McClain, Cr. Laws, Section 484, we find this:

"As the indictment for robbery must allege everything necessary to constitute larceny, there may be a conviction for larceny under an indictment for robbery. So there may be conviction for larceny from the person."

The case of *Brown v. State*, 33 Neb., 354 (50 N. W. Rep., 154), is directly in point. This is in the syllabus:

"*Held*: That the charge of robbery includes the offenses of stealing from the person without force and violence or putting in fear, and that under an information for robbery the accused may be convicted of stealing from the person."

In that state there is a statute covering the crime of robbery and also one covering the crime of pocket picking. The last statute was as follows:

"Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence shall be deemed guilty of grand larceny, and shall upon conviction thereof be punished by confinement in the penitentiary for not less than seven years."

The defendant asked the trial court to charge the jury as follows, which was refused:

"The jury are instructed that if you find from the evidence that the defendant took the property described in the information from Anna M. Kervan, against her will, but did not first put said Kervan in fear, and did not use any force or violence except such as constitutes the sudden snatching of said property from said Kervan, you will not be warranted in finding the defendant guilty as charged in the information, but may find him guilty of larceny."

The court did give this instruction to the jury:

"It is permissible, under this information, if in your opinion the evidence justifies and warrants you in so doing, to find the defendant guilty of larceny from the person. The putting in bodily fear, or the use of force and violence, is not a necessary element in the crime of larceny from the person, but the felonious taking and carrying away from the person with the intent to convert property to his own use and against owner's consent, are necessary." * * *

The Supreme Court say in the opinion, pp. 357-358:

"The question of the validity of Section 113a was before this court in *State v. Arnold*, 31 Neb., 75 (47 N. W. Rep., 694), and the statute sustained. The latter statute was passed to reach the case of pickpockets, who, prior to the passage of the act, had comparative immunity from punishment (*State v. Arnold, supra*). Robbery is the felonious and forcible taking from the person of another goods or money of value by violence, or putting in fear (4 Black. Com., 243; 2 Bouv. Law Dic., 488). The crime of stealing from the person is not as heinous a crime as that of robbery; but it possesses some of the elements of robbery; in other words, it is of the same nature, but does not go as far as robbery. To the extent of taking from the person of another money or other valuable things, both offenses are alike, and both are punishable in the penitentiary. The crime of robbery certainly includes the crime of stealing from the person, and when such is the case the jury may find the accused not guilty of the higher offense and guilty of a less one. There was no error, then, in giving and refusing the instructions referred to. There is no error in the record, and the judgment is affirmed."

This case seems to hold squarely that the offense of stealing from the person is included in the charge of robbery, and that where one is indicted for robbery, he may be found guilty of pocket picking.

There are other authorities that might be cited, but these are sufficient, and they establish that the offense of pocket picking is included within the charge of robbery, and that it is properly denominated an offense of a lower degree or a less degree than the crime of robbery. It lacks the one essential element of robbery, to-wit, that of force or putting in fear. It is, in fact, a crime of a less heinous character than that of robbery. It is punishable by a shorter period of imprisonment in the penitentiary. We think it may properly be called a crime of a nature similar to that of robbery—a crime against the person, involving the stealing of something of value from the person, but an offense of a lower grade or degree. This amendment relating to pocket picking was doubtless enacted by the Legislature to meet cases where persons were charged with the crime of larceny in the indictment, and the evidence failed to show the one

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element necessary to constitute the crime of robbery along with the other two, to-wit, that of force and violence. To meet such cases as that the Legislature made pocket picking a penitentiary offense, including it in the same statute.

The defendant can not complain that he has not been notified of the nature of the charge against him in such an indictment. He has been notified of the entire charge. He has been charged with the offense that he has committed, and with one element more. This could not mislead him. The fact that he was charged with taking property of value from the person of another, and also charged with taking it by violence or putting in fear, could not mislead him in making his defense or preparing for his defense. The two crimes are of the same essential character. They are both offenses against the person, and differ only in this element or ingredient of force or violence. We therefore are of the opinion that it was not error for the court to submit this question to the jury, and that the defendant could be properly convicted of the offense of pocket picking under the indictment charging him with robbery.

It is claimed by the State that the evidence contained in the record shows that the defendant was guilty of the crime of robbery, and that the court erred against the State in taking that question from the jury. No cross-petition in error has been filed by the State. Therefore it is not necessary for us to consider that question. We have not considered it, and do not pass upon it in the case.

For the reasons stated the judgment of the court of common pleas will be affirmed.

Wertman & Dickey, for plaintiff in error.

W. G. Ulery, Prosecuting Attorney, and *J. H. Martin*, for defendant in error.

PRIORITY OF LIENS—FOREIGN DEEDS OF ASSIGNMENT.

[Circuit Court of Monroe County.]

**THE KEYSTONE BANK OF PITTSBURGH V. UNION OIL COMPANY
ET AL.**

Decided, April Term, 1903.

Lien of a Foreign Deed of Assignment Prior to an Unrecorded Transfer of Interest in Oil Leasehold—Power of Majority of Stockholders of Corporation to Make Deed of Assignment—Distribution of Fund in What Forum.

1. A deed of assignment duly executed under the laws of the state of Pennsylvania by a corporation of that state, conveying all its real and personal property to a trustee for the benefit of all its creditors and duly recorded in this state, is a prior lien upon the working interest of the corporation in oil wells, property, and production, situated upon and arising out of an oil leasehold within this state, to that of prior transfer made in writing by the corporation to parties within that state to secure an existing indebtedness of the grantor and not left for record until after the record of the deed of assignment; the creditor holding such transfer not being in the actual and open possession of such leasehold at the time of the execution and recording of such deed of assignment.
2. The stockholders of an insolvent corporation at a meeting regularly called for that purpose, may authorize and direct the transfer of all its property to a trustee for the benefit of all its creditors, when at such meeting a large majority of its stock is represented; and an assignment made in pursuance of such authority and direction will be upheld, the minority stockholders having full opportunity to do so, making no objection thereto.
3. In an action for the sale of property situated within this state, conveyed by a deed of assignment for the benefit of creditors made in a foreign state, for the marshalling of liens, and for the distribution of the proceeds of sale, in which action the assignee is a party and a receiver is appointed who makes sale of the property, the fund arising from such sale will not be delivered to the assignee appointed in the foreign state, but the receiver will be directed to disburse the same.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Appeal from Common Pleas Court of Monroe County.

The plaintiff, The Keystone Bank of Pittsburgh, is a corporation located at Pittsburgh, state of Pennsylvania, and the

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defendant, The Union Oil Company, is a corporation with its principal office in the same city.

The Union Oil Company was the owner of an oil and gas lease upon the premises of J. W. Martin, situated in Washington township, this county, and had drilled and was operating a number of oil wells upon such leasehold. Its working interest was three-fourths of the oil, Martin receiving the other one-fourth as royalty.

On August 27, 1900, the oil company had become indebted to the Keystone Bank for money loaned it, in drilling and running its wells, in the sum of \$15,000—twenty-five hundred dollars of said amount being advanced on that date; and it was then agreed between the bank and the oil company, that its line of credit should be further extended to the sum of \$20,000, the oil company to transfer to it as security its interest in the leasehold premises, the following memorandum of agreement being entered into:

“PITTSBURGH, PENNSYLVANIA, August 27th, 1900.

“To the Buckeye Pipe Line Company, Macksburg Division.

“We have this day sold 3-4 W. I. Wells Nos. 1 and up on J. W. Martin farm, Washington township, Monroe county, state of Ohio, as below:

“3-4 interest Keystone Bank No. 13 account, Pittsburgh, Pa. You will therefore transfer their credit on your books. Pipe Line Tanks Nos. 10227-10228.

“UNION OIL COMPANY,

“S. B. FORST, *President*.

“The assignee above named hereby certifies and agrees that it is the legal owner of the well interest above transferred, and authorize the Buckeye Pipe Line Company, until further notice, to receive oil for transportation and storage pursuant to above transfer. * * *

“KEYSTONE BANK,

“W. H. NIMICK, *Vice-President*.”

On the 17th day of October, 1900, The Union Oil Company having become insolvent, at Pittsburgh, Pennsylvania, made a general deed of assignment to Morris Forst, its vice-president and secretary, of all its property for the benefit of all its creditors. This deed of assignment was duly executed under all

the formalities necessary in the state of Pennsylvania to convey real or personal property; it was delivered to the trustee, Morris Forst, and by him left for record with the recorder of this county on the 20th of October, 1900, and was duly recorded in the record of deeds in his office. This deed is in the ordinary form of deeds of assignment generally used in this state, and provides that the trustee shall reduce all the property to money, and after payment of costs and expenses, divide the residue equally among all the creditors of the oil company.

After the execution and record of the deed of assignment, the trustee, Morris Forst, was removed by the Common Pleas Court of Allegheny County, Pennsylvania, for his failure to give bond as required by the laws of that state, and The Equitable Trust Company of Pittsburgh was appointed in his place.

The evidence, we think, clearly shows that no possession was taken by the Keystone Bank of the property in this county. Morris Frost still continued to operate the property after the execution of the memorandum of agreement, as he had done before, and he testifies that after he was appointed trustee in the deed of assignment, he held the property as such trustee until it was turned over to his successor, The Equitable Trust Company, and there is nothing to contradict his testimony.

On June 6, 1901, the Keystone Bank left the memorandum of agreement transferring the leasehold interest of The Union Oil Company to it with the recorder of this county, when it was duly recorded by such recorder, and the bank immediately commenced this action in the common pleas court of this county against The Union Oil Company, The Equitable Trust Company, as assignee of The Union Oil Company, and others, for the purpose of determining the rights of the parties in the property in controversy. In this action a receiver was appointed, and by consent of all parties the property was sold; the money brought into the common pleas court, and the question that is made is as to the manner of its distribution.

The claim of the Keystone Bank is, that the transfer to it by The Union Oil Company by the memorandum of agreement, created an equitable lien upon the property, and further, that The Equitable Trust Company as assignee holds the property

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under the insolvent laws of the state of Pennsylvania primarily for the benefit of the assignor, and therefore it is estopped from setting up any claim against the equity of the bank, or at least under these circumstances, the equity of the bank is preferable and prior to the equity of the trust company as such assignee.

Many authorities have been referred to in the exhaustive arguments and briefs of counsel for plaintiff, for the purpose of demonstrating that under the law of Pennsylvania the memorandum of agreement between the bank and oil company created an equity in favor of the plaintiff, that it was an equitable assignment of the property from the oil company to the bank; but the question to be determined, as we view it is, not what the law of Pennsylvania makes it, but what is its legal effect under the laws of the state of Ohio. The property is situated in this state, and under our law oil and gas are a part of the realty, and special provision has been made by statute for the manner of its sale and transfer by deed or lease.

This agreement on its face purports to be, and the transaction shows, that it was a transfer of the leasehold estate of the oil company to the bank, for the purpose of securing it for money already advanced and to be advanced. It says, "We have this day sold three-fourths working interest, wells number one and up on J. W. Martin farm, Washington township, Monroe county, state of Ohio." In the amended petition filed by the bank and upon which petition the case was tried it avers: "That in the execution and delivery of the transfer, plaintiff and the said Union Oil Company believed that the same was a sufficient transfer to plaintiff of said wells, property and production, and vested in plaintiff a good and indefeasable title thereto; that it was then the intention of the said Union Oil Company to transfer to plaintiff by said written agreement, all its right, title and interest in said property to be held by plaintiff as security for said loan of \$15,000, and accepted the written agreement aforesaid."

Section 4112a of Revised Statutes provides:

"That all leases and licenses and assignments thereof, or of any interest therein heretofore executed, given or made for, upon or concerning any lands or tenements in this state whereby

any right is given or granted to operate, or to sink or drill wells thereon for natural gas and petroleum, or either or pertaining thereto, shall be recorded in the lease record in the office of the recorder of the proper county by the first day of September, 1888, and all such leases, licenses, and assignments hereafter executed given or made shall be filed for record as aforesaid forthwith, and recorded in said lease record without delay, and shall not be removed until recorded, and no such lease or license hereafter executed or given, or unless the person claiming thereunder is in actual and open possession, shall have any force or validity until the same is filed for record as aforesaid except as between the parties thereto."

The remainder of the section provides for actions to cancel oil and gas leases and licenses, and provides that no person shall be necessary parties to such action or to any action involving the same except such as are shown by the lease record to have an interest in the lease, or license, or such as are in the actual and open possession of the premises.

We think this section is controlling as to the legal effect to be given to the agreement between the plaintiff bank and the defendant oil company, and that this agreement had no effect whatever as to third parties until it was filed for record with the recorder of this county.

But if we were in error about the agreement between the parties being controlled by this section of the statute, certainly it would be controlled by the provisions of the statute of this state respecting mortgages of real estate and personal property, as the transfer was made as a security, and therefore, under the decision of our Supreme Court, would be a mortgage, and being a mortgage would have no validity until it was duly executed and left for record with the proper officer. *Van Thorniley v. Peters et al*, 26 O. S., 471, and cases therein cited.

This brings us to the consideration of the question as to the legal effect of the deed of assignment made by The Union Oil Company to Morris Forst.

A large amount of evidence has been introduced for the purpose of showing what the law of the state of Pennsylvania is respecting deeds of assignment under the insolvent laws of that state, and the evidence shows from the decisions of the supreme

and other courts and the testimony of competent attorneys learned in the law, that under the insolvent laws of that state the assignee primarily represents the assignor; indeed stands in the place and stead of the assignor, and it is contended with much force that therefore the assignee can not contest the claim of the plaintiff, and that under Section 4112a the assignee comes under the exception, "except as between the parties thereto."

As we view the case it is a matter of no importance what the law of Pennsylvania is respecting the mode of administering insolvent estates under deeds of assignment for the benefit of creditors. Our courts take no cognizance of the insolvent laws of other states in administering assignments. Assignments made within our own jurisdiction are only administered by our own courts as courts of insolvency. *Johnson v. Sharp*, 31st Ohio State Rep., 611, and cases therein cited.

At the same time such deeds will be given full force and effect when properly executed, and, when necessary, recorded in accordance with our registry laws, as conveyance of property, and a court of equity in this state will enforce the trust created in the deed when the same is not in conflict with the law and policy of the state as to distribution of the property. *Johnson v. Sharp, supra*; *Pendleton v. Galloway and others*, 9 Ohio Rep., 178; *Wright et al v. Franklin Bank et al*, 59 O. S. Rep., 80.

Under our law such deeds are ordinary deeds in fee simple to a trustee upon an express trust, and as to property situated in this state will be treated and enforced as such in accordance with the laws of this state. Cases *supra*.

The case of *Wright et al v. Franklin Bank et al, supra*, is very much like the case under consideration. T. B. Youtsey, of Newport, Kentucky, assigned and transferred his interest in the Hyde Park Syndicate property in Hamilton county, Ohio, to James C. Wright to secure the payment of certain promissory notes. The transfer was made by a simple memorandum to that effect signed by him and of date January 16, 1895. It was neither acknowledged nor recorded. January 21, 1897, T. B. Youtsey, still being a resident of Newport, Kentucky, executed a deed of assignment for the benefit of his

creditors to C. N. Nagle of same city. This deed of assignment was left for record with the recorder of Hamilton county, Ohio, January 22, 1897, and duly recorded, and the controversy was between Wright and Nagle, assignee, as to who held the prior lien and claim upon the interest of Youtsey in the Hyde Park Syndicate property.

In deciding the case the court conceded that the body of the writing of January 16, 1895, signed by Youtsey, was sufficient in form to create a lien upon his interest in the syndicate property in favor of Wright, but the court says on page 93 "that the statutes of this state require all instruments in the nature of a mortgage, either legal or equitable, to be signed, acknowledged, witnessed and recorded; and until so signed, acknowledged, witnessed and delivered for record, the same are without effect as to third persons."

And then on page 95 as to the deed of assignment:

"The deed of assignment was executed and delivered in the state of Kentucky, where all the parties resided, and conveyed property in Hamilton county in this state. Such a deed could not be filed with the probate judge and take effect from the time of its delivery to him as required by Section 6335, Revised Statutes. The deed in this case was in due form and took effect from the time of its delivery to the assignee. *Johnson v. Sharp*, 31 O. S., 611."

The court then finds that the Circuit Court was right in holding and adjudging that Nagle, assignee, had the superior lien.

Another question is made, and that is, that the deed of assignment is not a legal one. This claim is based upon the fact that all the stockholders were not present either in person or by proxy at the meeting at which the deed of assignment was directed to be executed. It is true that the deed purports to convey all the property of every character and description of which the Union Oil Company was possessed, and that as a general rule all the property of a corporation can only be conveyed by the assent of all the stockholders. But there are exceptions to this rule.

In the 7th volume of the *American & English Encyclopedia*, page 735, it is said:

“Some courts hold that a majority of the stockholders of a strictly private corporation may thus sell and convey all of its property even against the dissent of the minority, when the exigencies of its business renders it necessary or expedient to do so.”

The text is supported by a number of cases from different states, especially from Massachusetts.

The business of The Union Oil Company had failed and it had become insolvent. Under such circumstances the corporation should hold its property for the benefit of all its creditors; justice required it should do so. It did only what a court of equity would have compelled it to do upon proper application—distribute its property equally. Furthermore there were but thirty-five shares of stock out of five hundred that were not represented at the meeting. The holders of these thirty-five shares never have objected and are not now objecting to the execution of the deed, although they have had ample opportunity to do so. No one connected with the corporation is objecting; the objection alone comes from the plaintiff who claims the prior lien against the general creditors, who are numerous. Every intendment should be in favor of the validity of the deed, which makes an equal distribution of the property. We are not informed as to what the law of the state of Pennsylvania is respecting the transfer of property by a corporation, and therefore we are at liberty to apply the law of our own state, and we do not think that the law of this state requires, under all circumstances, all the stockholders of a corporation to consent before it can convey all its property. *Stetson v. Bank of New Orleans*, 12 O. S., 577; *Wiswell v. The First Congregational Church*, 14 O. S., 31; *Rolling Stock Company v. Railroad Company*, 34 O. S., 450; Revised Statutes, 5651, etc.

One other question is made, and that is, who should control the fund? The Equitable Trust Company situated at Pittsburgh, Pennsylvania, the assignee appointed by the court of that state, insists that it should be turned over to it, while the receiver appointed by the common pleas court of this county, as well as a number of creditors of the oil company from this state and also of Pennsylvania, insist that the receiver should control

and disburse it, as it will be attended by much less expense. We see no reason to remove the fund from our own courts. It is doubtful if The Equitable Trust Company has any standing in the case; as we have seen the deed has no effect under the insolvent laws of Pennsylvania. Probably a trustee should have been appointed by the lower court in this action. Waiving that, it has no legal right to remove the fund to another jurisdiction; but as it has been to expense in the litigation it should be reimbursed out of the fund for all such expenses, including reasonable counsel fees.

It is ordered and adjudged that the receiver—

First. Pay the costs of the action, including expenses and reasonable counsel fees, to The Equitable Trust Company.

Second. He pay the mechanics' liens, which are conceded to be a prior lien.

Third. He distribute the residue of the fund to the creditors generally of The Union Oil Company, including the claim of the Keystone Bank, and if there is any surplus after paying the creditors, it be paid over to the Union Oil Company.

Cause is remanded to common pleas court for execution.

If there is any difficulty in arriving at the amounts to be paid each party, which is hardly probable, that court can determine the question.

Mallery & Sears, for plaintiff.

Hamilton & Matz, Lynch & Moore and Boyce, for defendants.

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DELAY IN APPEARING BEFORE A JUSTICE OF THE PEACE.

[Circuit Court of Wood County.]

**JOHN W. BROWNSBERGER v. THE CINCINNATI, HAMILTON &
DAYTON RAILROAD COMPANY.**

Decided, April 25, 1903.

*Justice of the Peace—Margin of One Hour for Appearing Before—
Not Available to a Defendant, When.*

When a case is called before a justice of the peace and a jury is impaneled, it is the duty of the defendant to be there at the time appointed, or if the case is adjourned he should be present at the time to which it is adjourned, and there is no authority upon which a defendant may demand a postponement of the case for one hour after the time to which it is first adjourned.

HAYNES, J. (orally); PARKER, J., and HULL, J., concur.

Error to the Court of Common Pleas of Wood County, Ohio.

This is a petition in error, the main question, and the only one perhaps, being as to the right and claim of the defendant in error, the railroad company, that its attorneys had a right of one hour to appear when a case was adjourned.

The facts are that Brownsberger had a claim some two years old against the railroad company, and it not being adjusted he brought it to a suit before a justice of the peace in Weston township, this county. The suit was commenced and service was made upon the agent of the Cincinnati, Hamilton & Dayton Railroad Company at Weston, although the return is not in fact correct.

At 9 o'clock on the return day the agent of the railroad company at Weston appeared with a telegram from the general counsel of the railroad company asking that the case might be postponed until he would have time to look into it, and this the justice declined to do. The agent was there, and remained there. The plaintiff then demanded a jury trial. The amount sued for was \$17.93, which with the interest would amount, as we figure it, to a little over twenty dollars—principal and interest. When the plaintiff's attorney demanded a jury the justice issued a venire and asked the agent of the railroad company to strike off the jurors; he declined to have anything to do with the

matter, and thereupon the justice struck off for the company and a jury was impaneled. The case was postponed until 1:30 that afternoon, and at 1:30 o'clock the jury was called, and the case proceeded to trial, and at 1:40 o'clock the case had been heard, a verdict returned and judgment rendered. Soon after that, or about that time, there appeared before the court Mr. Watts, as attorney for the railroad company, and he promptly filed a motion to set the judgment aside, and allow him to come in and have a trial; the court refused that and entered the judgment, and a bill of exceptions was taken and the case was brought to the court of common pleas, and the court of common pleas reversed the judgment of the justice on the ground that the defendant railroad company was entitled at 1:30 o'clock to an hour within which to appear; that is, to say, they could not go to trial before 2:30 o'clock P. M., and to reverse the judgment of the court of common pleas a petition in error is filed by Brownsberger. The statute bearing upon this subject is 6482, which is as follows:

"The parties are entitled to one hour in which to appear after the time mentioned in the summons for appearance, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present, is engaged in the trial of another cause; in such case the justice may postpone the time of appearance until the close of such trial."

It will be seen from that section that each party has a right to an hour within which to appear. Section 6547 provides that either party may demand a jury, and how it shall be composed; and Section 6548 provides:

"When a jury is demanded, the trial of a cause must be adjourned until a time fixed for the return of the jury; if neither party desires an adjournment, the time must be determined by the justice, and must be on the same day or within the next two days; the jury must be immediately selected as herein provided."

Section 6576 provides that the action may be dismissed by plaintiff:

"When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter."

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It will be seen that nothing is said in that section about the right of the *defendant* to have an hour to appear. Now so far as that point is concerned, we are unable to find any statute that authorizes a defendant to demand that there shall be a postponement of the case for one hour after the time to which it is first adjourned. If the case is called and the jury is impaneled, it is the duty of the defendant to be there at the time appointed, or if the case is adjourned, he should be there at the time to which it is adjourned. For some reason the statute allows the plaintiff to have one hour before judgment can be entered against him dismissing the case without prejudice, if he fail to appear.

It looked rather upon the face of the petition as if there had been some attempt to hurry the case through and deprive the defendant of its right to be present, but upon a full examination of the record we have concluded that is only seeming; the justice followed the statutes in the case; the claim was an old one—two years old; suit was brought, returnable at 9 o'clock A. M. on the day of trial, and the application of the general counsel of the railroad company was for an indefinite postponement. A demand was made for a jury; the jury was struck in accordance with the statute, no one appearing for the railroad company and the agent refusing to strike the jury, the justice did so as provided by statute, and the case went to trial. The statute provides that the case should be heard the same day or at least within forty-eight hours; it being contemplated, it seems to us, as though it was to be a continuous matter. The application to set aside that judgment by the defendant is not in accordance with the statute; it gives no reason for non-appearance, neither does it make any offer to confess any judgment or to pay costs.

We are of the opinion that there is no error in the case, nothing to call for the intervention of the court of common pleas; we, therefore, will reverse the judgment of the court of common pleas, and affirm the judgment of the justice and order that a certificate be sent to the justice's court certifying the fact of this affirmance.

G. P. Thompson, for plaintiff in error.

A. V. Watts, for defendant in error.

NEGLIGENT RUNNING OF AN ELECTRIC CAR.

[Circuit Court of Lucas County.]

TOLEDO, FREMONT & NORWALK RAILWAY CO. v. DAVID GILBERT.

Decided, July 1, 1902.

Negligence—Electric Car Runs Rapidly Into Darkness—And Strikes a Wagon—Driver of the Wagon Exonerated—Charge of the Court—What the Record Must Show as to Requests for Instructions Before Argument—Instructions Given After Argument.

1. A refusal of the court to give instructions to the jury before argument does not constitute error, unless it affirmatively appear from the record that the requests for instructions were written requests.
2. Treating such requests as having been made after argument, the action of the court in refusing them can not be complained of where they are substantially covered in the general charge.
3. It is negligence for a motorman to run his car into a place where his view is obscured without having the car under control.
4. Where one driving on a street railway track in the middle of the street looks behind him twice for the approach of a car within a comparatively short distance, and sees no car approaching, and then, while his attention is upon a steam railroad crossing just ahead, a car comes up behind and collides with his wagon, he will not be held to have been guilty of contributory negligence.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

The defendant in error brought this action in the court of common pleas to recover for injuries which he sustained by being struck by a street car on the track of the plaintiff in error (defendant below), claiming that the street car company was negligent in the manner of running a car and in not seeing him on the track, and that his injuries were due to the negligence of the street railway company. He asked damages in the amount of \$175, and was awarded by verdict of a jury the full amount of his claim. A motion for a new trial was overruled, and the court rendered judgment against the plaintiff in error, and it is to reverse that judgment that this proceeding in error is brought.

Various errors are complained of by the plaintiff in error, upon the trial of the case. In the admission and exclusion of evidence, in the general charge of the court as given, and the instructions which were given at the request of the plaintiff below, and to the refusal of the court to give the requests of defendant below; and further, it is claimed that the verdict was not sustained by sufficient evidence; is contrary to the weight of the evidence, and that, therefore, the judgment of the court is contrary to law.

The accident occurred on Woodville street in East Toledo, Ohio. Plaintiff was driving on the track at a point near the Wheeling & Lake Erie Railroad Company's tracks. He was riding on a hay rack, and the car struck his wagon and practically demolished it; the horses were thrown to one side of the track and sustained some injury, and Gilbert jumped to the other side and sustained some injury. Gilbert claims that the car was running at a dangerous and negligent rate of speed at the time; that the motorman was negligent in not seeing him and in not stopping or slacking the car before it struck him, so that he might have had time to get off the track.

The railroad company denies all negligence on its part and claims that whatever injuries Gilbert sustained were due to his own negligence. There were some exceptions taken during the trial of the case to the exclusion of evidence offered by the defendant below. The defendant below sought to show by the motorman that when he saw Gilbert on the track he supposed he was going to get off. He was asked this question, page 70:

"Now, when you first saw this man turn on the track, what impression did it make on you—what with reference to what he was going to do or was doing?"

An objection to this question was sustained and exceptions taken and the exclusion of this testimony is one of the errors alleged. In this connection, it may be well to state just about what the surroundings were. At the time of the accident the car was starting on its trip to Fremont, and it came on to Woodville street from East Broadway some 1,500 feet from the Wheeling & Lake Erie railroad track; and about 1,100 feet

from where the car come on to Woodville street from East Broadway, there was an electric light standing in the street. The car had a headlight upon it, and the motorman testified that, on account of the glare of the electric light and the glare of his headlight, he was unable to see beyond the electric light in the direction of the Wheeling & Lake Erie railroad crossing, and that he did not see Gilbert on the track with his hay rack until the car was under the electric light and Gilbert was then 150 to 200 feet off, and he says that as soon as he saw him he rang the gong and Gilbert turned his horses off, but did not get off the track, and the car struck the wagon within a very short space of time thereafter. Now the motorman was asked on page 67 of the record, this question:

“What was the party who had the wagon doing, if anything, at the time?”

And he answered:

“When I first discovered the wagon and started under the light and began to ring the gong hard I noticed the team turn a little to the side, and I supposed that he was going to get out of the way. I kept ringing the gong,” etc.

So it will be seen that the witness had already been asked and answered this question, in substance, which was excluded by the court, and which he was not then permitted to answer, and there was no error in the court's refusal to permit the question and answer to be repeated. On page 69 he was asked whether, in his judgment, Gilbert had time to get off the track. Objection to this was sustained and exception taken. We think it very doubtful whether that question was proper; that was a question for the jury—as to whether he had time to get off the track—under all the circumstances as appeared from the evidence. But he had already answered that question. He says, in his answer to a question which had been put to him before that, page 69:

“I will ask you to state as to whether or not from the time you rang the gong and discovered that team and wagon on the track—whether they had time to leave before you got down to where he was? A. Yes, sir; they had plenty of time.”

So that there was no error in the court's refusing to permit that to be repeated; it had been asked once and answered, and that was sufficient at all events.

At the conclusion of the evidence there were certain requests to charges made by the plaintiff, and others made by the defendant. The record shows this: "Thereupon, and before the argument, the plaintiff, by his counsel, requested the court to give to the jury before argument, among other requests, the following, to-wit;" and then follow two requests, made by the plaintiff, and which were given. To that exception was taken. Those I will discuss a little farther along. Then this follows in the record: "And the defendant likewise submitted to the court certain requests which it asked to be given to the jury before argument, as follows, to-wit;" and then follow certain requests to charge made by the defendant, some of which were given and some refused, and exception to the refusal was taken in this language: "Thereupon the defendant, by its counsel, excepted to the refusal of the court to give to the jury in charge defendant's request numbered four; and defendant likewise excepted to the refusal of the court to give in charge defendant's request numbered six; and defendant likewise excepted to the refusal of the court to give to the jury in charge defendant's request numbered seven, all as above set forth." Error is claimed here on account of the refusal of the court to give these requests of the defendant below. These requests, it appears by the record, were made before argument, as the language of the record is as I have read: "And the defendant likewise submitted to the court certain requests and which it asked to be given to the jury before argument, as follows, to-wit." They were made under paragraph five of Section 5190, Revised Statutes, which gives to counsel this additional right (which was not had before) to submit instructions in writing before argument, and have them given to the jury before argument. It reads as follows:

"When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

To constitute error in the action of the court under this provision, however, the record must show affirmatively that the provisions of the statute were complied with. As is said by the Supreme Court in the case of *Monroeville v. Root*, 54 Ohio St., 523:

"Section 5190, Revised Statutes, as amended March 3, 1892 (89 O. L., 60), confers upon parties the right to have such correct written instructions as may be requested given to the jury before the argument.

"To constitute error under this provision of the statute, the record must affirmatively show that the court was requested to give such instructions before the argument, and that its refusal to do so was the subject of an exception."

In this case decided by the Supreme Court the record did not show affirmatively that it was requested that the instructions be given before argument. The language of the statute being that "either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced." The Supreme Court say, in the opinion, on pages 527, 528:

"But, notwithstanding this provision of the statute, it must frequently, if not usually, be a matter of indifference to counsel whether the requested instructions precede or follow the argument. And it will still be proper for counsel to present their requests to the court before argument, even if they are willing that they should be given after it. The record submitted to the circuit court did not show that this was not a case of that character. It does show that the propositions were submitted to the trial judge before the argument, and that there was a request that they be given to the jury. But it does not appear that it was desired that they be given before the argument. Nor does the exception show that it was taken to a refusal to give the instruction before the argument. It can not be inferred from this record that the attention of the trial judge was in any way called to the right conferred by the amended statute. There was, therefore, no case for a reversal upon the ground stated by the circuit court."

And the circuit court was reversed. This record before us does not show that these instructions that were requested of the court were written instructions; it simply shows that the de-

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fendant submitted to the court certain requests which they asked to be given to the jury before argument, and shows that the court gave some of the instructions. It does show that the court read those which were given, and if there could be any inference at all it might be inferred that those were committed to writing, or printed, by some one, but by whom it does not appear. And as to those which were refused, the records shows nothing, and for aught that appears in the record, the requests, as is often the case after argument, may have been the oral requests of counsel, and not made in writing. To constitute error in the action of the court in this respect, the record must show affirmatively that the requests for instructions were written requests, which the statute clearly contemplates the court shall have opportunity to examine and deliberate upon, if it desires, before they are given to the jury or refused.

This record does not show that the exceptions were taken, as suggested by the Supreme Court in this case to which I have referred, to the refusal of the court to give the requests before argument. The record states: "Thereupon the defendants by its counsel excepted to the refusal of the court to give to the jury in charge defendant's request number four," etc. But it is sufficient to say that the record does not show, affirmatively, that these were written instructions; that they had been prepared by counsel in writing before they were requested of the court; and if these requests which were refused were covered by the general charge, no error can be predicated upon the action of the court in refusing to give these requests before argument, for in case of requests made after argument, and refused by the court, if they are substantially given in the general charge, the party can not complain, as was held by the Supreme Court in the case of *Schweinfurth v. Railway Co.*, 60 Ohio St., 215, where the court say:

"It is error to reverse a judgment for the refusal to give an instruction requested by a party, the substance of which is contained in the charge given, or one that contains an inaccurate statement of the law, or assumes the existence of a material fact in dispute."

So if the substance of the request is given in the general charge, where the request is made after argument, it is not error to refuse the request; in other words, the court is not bound to give the instruction in the exact language requested by counsel, if it is given in substance in the general charge. And on examination of the general charge in this case we think that these requests, so far as they were proper and the defendant below was entitled to have them given, were given by the court in the general charge, and these requests are to be considered the same as though there were not requests asked to be given before argument, but as though they had been requested after argument.

We, therefore, find that the record does not show any error in the action of the court in refusing these requests. It is not necessary to discuss the requests in detail, but we hold that they were substantially covered, insofar as they were proper, by the general charge of the court.

The defendant below excepted to the giving of two instructions that were given at the request of plaintiff below. Request No. 1 was as follows:

“Woodville street in the city of Toledo was originally laid out and established for the use of pedestrians and vehicles; and this use has not been taken away because electric cars have been permitted to run along and over the same. The use of streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways.”

This portion of the instruction is based practically upon the decision of the Supreme Court in the case of *Cincinnati St. Ry. Co. v. Snell*, 54 Ohio St., 197, and some of the language contained is perhaps taken from the words of the opinion in that case. No serious objection is made to that part of the request, but the following paragraph is objected to:

“It was, therefore, not negligence on the part of the plaintiff to drive in the center of this street, and along the track of the defendant, but in so doing, plaintiff must have exercised the care that would be exercised by an ordinary prudent man under the same or similar circumstances.”

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The particular language objected to is this:

“But in so doing, plaintiff must have exercised the care that would be exercised by an ordinarily prudent man,” etc.

Defendant's counsel argue that the use of the words “must have exercised the care,” was improper and erroneous; that it amounted to charging the jury that the plaintiff below *did* exercise such care when the court stated to the jury that *he must* have exercised such care. It does not seem to us, considering those words in connection with all the court said in this paragraph, that they would bear that construction, but that they meant to the jury simply that the plaintiff should exercise care, or ought to exercise care. If the word *must* is used at all, it is difficult to see how any expression could have been used different from that which the court did use. He could not have said that the plaintiff *must exercise*, for that would have been the present, or the future, and this related to the past. This instruction, “but in so doing plaintiff *must have* exercised the care,” etc., we think the jury must have understood to mean simply that it was the duty of the plaintiff to exercise ordinary care, and there was no error in the court giving this instruction as written.

Request No. 2 was given, and it was also expected to. We are of the opinion that this instruction, as a general proposition of law, is too broad and goes too far in laying down the duty of the railroad company to observe and look out for persons upon the track and to slacken its cars when the motormen observe them upon the track; that it goes further than the company should be required to go and imposes more on the railroad company than the law requires. The instruction might be construed to mean that whenever a motorman saw a man on the track, however far he was away, it was his duty to at once get his car under control and slacken its speed so that he might stop it in case the man did not get off the track. This, it seems to us, leaves out the doctrine of ordinary care and the presumption that the motorman might have that the man would get off the track in time to avoid injury, so as a proposition of law, relating to a case where a man had been seen for some distance ahead of

the car on the track, when he might be presumed to get off in time, we think this instruction goes too far; but we are to consider whether it was error to give it under the facts of this case.

The negligence in this case, if there was any negligence, consisted in allowing the car to run at a negligent rate of speed before the car reached the electric light. According to the testimony, there was at this place in the street quite a steep grade and the electric light stood at the brow of the hill in the road. The motorman testifies that he could not see beyond the electric light, on the night in question, on account of its glare and the glare of the headlight, and when he did see the plaintiff that he was within from 150 to 200 feet of him. The testimony shows that this car was running at quite a high rate of speed, just how many miles an hour it was running, of course, can not be exactly determined. Gilbert testifies that it looked to him as though it was going at least forty miles an hour, and almost immediately after he saw it it struck his wagon. The conductor and motorman thought it was not going over eight or ten miles an hour; but it is clear that it was going at a high rate of speed; that it was going so fast that after the motorman discovered Gilbert upon the track, as he himself testifies, he was unable to stop the car before it struck Gilbert's wagon, the car being on the grade, and there being snow on the ground at the time and the track slippery. And the negligence of the company consisted in the motorman's running the car at such a high rate of speed before he reached the electric light and at such a speed down the grade in the street into the darkness, or what to him was darkness, where he could not see any object until he reached the electric light. We are of the opinion that ordinary care required him, running his car upon the hill in the middle of the street as this was, to have his car under such control and to be running it at such a rate of speed that in case he discovered a man on the track in the vicinity of the electric light, he would be able to stop the car. He knew this was a highway and knew it was being used for travel and was in the city of Toledo, and that there was liable to be on the other side of the electric light some one on this track, and it turned out that there was, and he was bound

to run his car with this state of facts in mind, to run it according to the circumstances that existed there. He was not permitted to run his car as though no one had the right to use the track except the railroad company, as laid down by the Supreme Court in *Cincinnati St. Ry. Co. v. Snell, supra*, where the question is fully discussed as to the rights of the public and the rights of the railroad company, each being equally bound to exercise ordinary care in keeping a lookout. The railroad company is bound to the exercise of ordinary care in regard to people upon the track, and looking out for cars. The traveler is to exercise ordinary care in getting off the track, and the railroad company has no exclusive right to use that portion of the street upon which its track rests. So it appears to us that, according to the testimony of the motorman himself, he was guilty of negligence in approaching this hill at this rate of speed, when he was unable to see beyond the electric light. He says in his testimony that he did not see the man until he was near the brow of the hill under the electric light, and then he at once rang the gong and had not rung it loudly until then, and that he at once applied the air as hard as he could and put sand on the track. This he says on page 69 of the record. And on page 70 he says the track was slippery and he was not able to stop the car; that the wheels were locked by the brakes and slid.

Now the motorman having been guilty of negligence before he saw Gilbert, in approaching this portion of the track at the high speed he did, we are of the opinion that the giving of this instruction was not prejudicial to the defendant below, and that, therefore, the case should not be reversed on that account. It was, it may be said, the duty of the motorman, as is said in this instruction, under the facts and circumstances of this case, when he discovered this man on his wagon, only 150 feet or a little more away, and his car on this slippery track, going at the rate of speed at which it was going, it was his duty in the exercise of ordinary care, to do all he could to stop the car and prevent the possible sacrifice of human life and the destruction of property, which was imminent when the motorman discovered that Gilbert would not be able to get off the track before the car reached him.

It is argued, strenuously, that the verdict was against the weight of the evidence and not sustained by sufficient evidence. The discussion already had on the instructions has covered that part of the case to some extent. The railroad company were bound to use ordinary care in the running of their cars. The track was in the middle of a public street, of the city of Toledo; the cars were heavy, a car weighing, it was said, some thirty tons; and the company knowing that travelers, in vehicles or on foot, were liable to be upon the track at that time and place, were bound to run their cars with that in view and in such manner as would be ordinary care under all the circumstances and facts, and we are of the opinion that it was negligence for the motorman to approach this grade in the street at the high rate of speed with which he did without having his car under control so that he might slacken its speed or stop it in case he discovered any one on the track beyond the electric light.

It is urged that Mr. Gilbert himself was guilty of contributory negligence. He testified that he looked for cars when he turned onto Woodville street at East Broadway, which was about 1,100 feet from the electric light, and saw none, and that when he reached the brow of the hill, just before he began to descend, he again looked, being then about 1,100 feet from East Broadway. He neither saw nor heard any car, and he then began to descend the hill and was then approaching within a few hundred feet of the Wheeling & Lake Erie railroad, which would require some attention on his part, and after starting down the hill he did not look again until he heard the gong of the street car as it passed under the electric light, and then he looked back and saw the car coming down and turned his horses and endeavored to leave the track, and his horses got off the track and his wagon was turned partly off the track, when he saw that the car was about to strike his wagon and he jumped to the side of the track opposite to where his horses were and saved his life. The car struck the wagon and cut it in two, and the horses were thrown over the embankment, the harness and wagon were destroyed and the horses somewhat injured. The "biding-pole" on the hay rack struck the front end of the car and punched a hole through the end of the car. The car went some fifty feet

beyond the spot where the wagon was struck before it could be stopped.

We think that here was a fair case to submit to a jury as to whether or not Gilbert exercised ordinary care. He had a right to drive on the street car track. The laying of a street car track on a street does not exclude the public from that part of the street. Street cars are permitted in the streets, as the Supreme Court say in *Cincinnati St. Ry. Co. v. Snell, supra*, for the reason that they do not interfere materially with the ordinary travel or obstruct it, and if they did, they would not be permitted in the streets. The street car is only another kind of a vehicle from a wagon, for the convenience of travelers, and persons and corporations in propelling them over the street must exercise care in running them the same as one driving a wagon or automobile, and Gilbert had the right to presume that the car, if any was approaching him from the rear, would be run with ordinary care. He was bound to exercise ordinary care in looking out for cars, but he was not bound to that high degree of care that he would have been if he had been riding or driving on a steam railroad track, where he had no right to be. Here he had the same right that the street railroad company had, and was bound the same as it to the exercise of ordinary care; and he having looked twice for cars within a comparatively short space of time on this street, and being at that time approaching a steam railroad track, with that to look out for, and having seen no car approaching from behind and heard none, we think that the jury were fully warranted in finding that he did exercise ordinary care, and that they were justified in finding that the street railroad company was negligent.

Some portions of the general charge are complained of, and especially the language of the court in saying to the jury that the street railroad company were bound to use reasonable care—every reasonable effort, to avoid injury to persons on the tracks. This expression is used two or three times in the charge in connection with other language, however, and the jury was instructed in other places in the charge that the railroad company was bound only to use ordinary care the same as Mr. Gilbert, and we are of the opinion that there was no prejudicial error

in the use by the court of this expression, and that the jury was not misled by it. No special exception was taken to this expression or to any part of the charge by counsel. A general exception only was taken to the charge as a whole, and we think that the charge as a whole stated the law fully and fairly.

On the whole record we are of the opinion that the case was fairly tried—fairly submitted to the jury—and that the verdict was fully sustained by the evidence. We find no error in the record to the prejudice of the plaintiff in error. The judgment of the court of common pleas is, therefore, affirmed.

Kinney, O'Farrell & Rimelspach, for plaintiff in error.

Charles G. Wilson, for defendant in error.

WILLS.

[Circuit Court of Cuyahoga County.]

JOHN COON, EXECUTOR, v. WM. B. DEMOORE ET AL.

Decided, July 25, 1903.

Husband Not Mentioned in Wife's Will—Bequests of Realty, Where Decedent's Holdings Were Technically Personality, Distributed in Accordance With Manifest Intention as Expressed in Will.

Mrs. DeM. died, leaving a will in which her husband was not mentioned. She bequeathed to Mrs. C. and Mrs. S. each a "one-half interest in fee simple in all my realty, wheresoever located, of which I may die possessed." It developed after her death that she owned no real estate whatever, but was a *cestui que trustent* of real estate in New York City, devised by her first husband. This interest, it was conceded at the trial, was as to her personality.

Held: That the estate of her second husband, who was surviving at the time of her death, takes the share to which the husband would have been entitled had the wife died intestate, including his interest in the will devising the New York property; and, following the evident intention expressed in the will, Mrs. C. and Mrs. S. each take one-half of the testatrix's interest in the property in New York.

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MARVIN, J.; LAUBIE, J., and WINCH, J., concur.

Appeal by defendant, V. A. Coon.

The case of John Coon, executor, against William B. DeMoore and others is here on appeal, and the purpose of the suit is to determine the rights of the several defendants in the property of which Ruth DeMoore was seized at the time of her death.

William B. Moore, since the suit was brought, has died, and one Snyder has been appointed as executor of his will, and he is made a party in the case, the case being revived in his name in place of that of William B. DeMoore.

Ruth DeMoore was the wife of William B. DeMoore. She died in this county and left a will, a codicil of which is the matter to be considered here, for it is under this codicil that the rights of the parties are to be determined in connection with the will. It reads as follows:

"I hereby give and bequeath to Mrs. Verona Coon one-half interest in fee simple in all my realty wheresoever located of which I may die possessed, and the other half of said realty I give, devise and bequeath to Mrs. Julia Stevens, wife of A. J. Stevens, of Cleveland. I also give all my personalty, including, jewelry, diamonds, clothing and furniture of which I may die possessed of to said Julia Stevens."

In the will of Ruth DeMoore she nowhere mentions her husband. She made no provision for him.

The Revised Statutes of Ohio, Section 4176, provide for the distribution of personal property where one dies intestate, and it provides that one dying intestate, leaving a widow or widower, that said widow or widower shall be entitled to have distributed to him one-half of the first \$400 of the personalty which shall be left after the payment of debts, and one-third of all the balance.

Section 5963 of the Revised Statutes provides that where one shall die testate, owning personal property, and leaving a will in which no provision is made for the widow or widower, such widow or widower, the relict of the testator, may elect whether to take the provisions of the will or the distributive portion to which said relict would be entitled in case the testator had died intestate.

It, of course, is conceded that under the exact language of these statutes, this widower would be entitled to no distributive portion, because the distributive portion is provided for one intestate, and it is provided for one leaving a will in which some provision is made for the relict widow or widower. In this case neither of these two facts existed. The widow did not die intestate, and she did not die leaving any provision for her surviving husband.

The Supreme Court of our state, in *Doyle v. Doyle*, 50 O. S., 330, have construed those statutes, and have said that the estate, when one dies leaving a will in which no provision is made for the surviving widow or widower, the estate in such case is to be treated as though the party had died intestate. Each of the sections which provides for a widow, provides, in the same connection, for the widower, and reads that when one shall die leaving a widow or widower, as in the case of *Doyle v. Doyle*, it is provided that in whatever personal estate the testator (I say testator because I think it is the right word for either sex) leaves, the husband is entitled to a distributive portion as though the wife had died intestate.

What was that personal property of which she was seized at the time of her death?

She had certain moneys, certain chattels, and she had whatever came to her by the third item of the will of Robert M. Walduck, deceased. She, at the time of his death, was left his widow, and subsequently married William DeMoore.

The third item of the will of Robert M. Walduck provides:

"I give, devise and bequeath all that certain house and lot situate, lying and being at the northeasterly corner of Sixth avenue and Eighth street in the city of New York, being the same property as mentioned and bounded in a certain deed made and executed by Philo T. Ruggles, master in chancery, to me, the said Robert M. Walduck, bearing date 24th March, 1847, and recorded in the office of the Register of the City and County of New York in liber 48 of Conveyances, page 161, March 24th, 1847; the dimensions whereof being twenty-four feet three inches in width by seventy-seven feet seven inches in length, more or less, and which premises is now subject to two separate mortgages amounting together to the sum of fifteen thousand five hundred dollars as subsisting liens therein,

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said property being also subject to a certain lease to James W. Scott and John W. Earle for the unexpired term of eight years from and after 1st October, 1875, at an annual rent of thirty-nine hundred dollars, payable monthly. Also all the rest, residue and remainder of any other real and personal estate of what kind or nature soever, or wheresoever situated, other than that hereinbefore bequeathed in and by the second clause of this, my will, of which I may die seized or possessed, unto David M. Walduck, as my executor and trustee as hereinafter named, to have and to hold the same upon trust, to take charge of, manage, collect and receive the rents and profits thereof, and out of the same to pay taxes, assessments, interest and insurance or other charges in relation thereto, and also pay all or any just debts—funeral and testamentary expenses appertaining or connected with the management of said estate, for, during and until my said executor and trustee in his judgment shall deem it safe and for the interest of the *cestui que trusts*, hereinafter named, to have a sale of said trust estate without sacrifice, and during such period until such disposition and sale of said trust property, my said trustee, or his successor after he shall have made said collections and payments as herein last above stated, he shall pay out of the net balance, if any remaining in his possession, the sum of seventy dollars per month to my dear wife, Ruth Walduck, for and during the present period until the said property shall be sold as hereinbefore mentioned; and for and during the like period after the payment of the said seventy dollars per month out of said fund, the net balance of said revenue shall be equally divided and paid over by my said trustee to'' certain parties named in this item of the will.

This property had not been sold by that trustee when Mrs. (Walduck) DeMoore died.

It is conceded by counsel representing all the parties here, and would be so if it were not conceded, that whatever interest Mrs. DeMoore had in this real estate described in the will of Robert M. Walduck, was personal as to her. She had no title to any real estate. Hence all the personal property, other than this interest in this real estate—all this interest was as to her personal. That being true, the surviving husband was entitled to distribution out of the entire estate.

But there remains still this question.

It should be said that when Mrs. DeMoore died she had no interest in any real estate in the world except so far as the

evidence shows, whatever interest she had in this New York property. Yet, by her will, she says:

"I hereby give and bequeath to Mrs. Verona Coon one-half interest in fee simple in all my realty wheresoever located of which I may die possessed, and the other half of said realty I give, devise and bequeath to Mrs. Julia Stevens, wife of A. J. Stevens, of Cleveland. I also give all my personalty, including jewelry, diamonds, clothing and furniture of which I may die possessed of to said Julia Stevens."

Now it is said on behalf of Julia Stevens that since Mrs. DeMoore left nothing but personal property, her interest in the New York property being personal, there was nothing for Mrs. Coon; Mrs. DeMoore had no realty and as she gave all her personal property to Mrs. Stevens, Mrs. Coon was left without anything. If this language of the will is to be held to this strictly technical meaning, that result would follow.

It is evident that Mrs. DeMoore, when she executed this will, meant something when she used this word "bequeath" applicable to personalty and real estate. When she bequeathed this to Mrs. Coon, she meant something in her will. It could mean nothing if by the interpretation or construction of this codicil it is to be said that her interest in that property in New York was personal. It was technically, personal.

Her husband was entitled to distribution in it as personalty.

Indeed, the first consideration of wills is to give such construction as will carry out the *intention* of the testator, if that can be done without violating the words of the will.

It is said that Mrs. Coon can get nothing, for this woman had no real estate; she had no realty; her estate in this property was not real; that she only had personalty. It is true that Mrs. DeMoore had no fee title; all the interest she had was an equitable one.

Can it be doubted that she meant by this item in her will, that whatever interest she had in this realty should go one-half to Mrs. Stevens and one-half to Mrs. Coon? The language in which Mrs. Coon's name is mentioned would be idle, would be meaningless, unless this woman had this in her mind.

Without going further into this, the authorities are numer-

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ous that in the construction of a will one must look into the *meaning*. Another is, that you must not *make* a will for the testator, or substitute anything, but if you know just what the testator meant and intended to do and can ascertain that from the language of the will, you can carry that into effect.

Numerous authorities have been examined, but we have not had time to write out an opinion in this case.

The authorities are so well collected in Underhill on the Law of Wills, and especially in Chapter 14 of Underhill on the Law of Wills and the authorities so fully cited there, that we think, in that chapter and the authorities there cited, and especially in Section 24 as I recollect it, that they fully justify the conclusion at which we have arrived.

There is not a particle of doubt in my mind, or in that of any of the court, that the authorities authorize us to make this finding: That Snyder, the executor of Wm. B. DeMoore, take the distribution to which DeMoore would have been entitled if his wife had died intestate, including his interest in this will; that Mrs. Coon take one-half and Mrs. Stevens one-half, together with all the other personal property, and the decree will be drawn accordingly.

John T. Sullivan, for plaintiff.

J. S. Grannis, John T. Sullivan, Caskey & Calhoun, for defendants.

OFFICIAL COURT STENOGRAPHERS.

[Circuit Court of Summit County.]

GIDEON CARR V. SUMMIT COUNTY.

Decided, October Term, 1902.

Official Stenographers—Fees Payable to for Making Transcripts in Criminal Cases—Differing Provisions Applying to Different Counties—The Statute Applicable to Summit County.

1. The fact that the different provisions of the statutes applicable in different counties of the state with reference to official court stenographers bear unequally upon persons accused of crime within the state, in that in some counties the fee for preparing a bill of exceptions is paid for out of the county treasury, and in other

- counties the accused is obliged to pay for it himself, does not render the statute unconstitutional which denies the favor of a free transcript in the counties in which it is applicable.
2. In Summit county the appointment and duties of official court stenographers are governed by Section 1 of 90 O. L., 68, and Section 2 of 87 O. L., 93.
 3. Whether the various statutes relating to official stenographers are in contravention of the constitutional provision requiring that all laws of a general nature have uniform operation throughout the state—*Quære?*

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Error to the court of common pleas.

This case arises upon the following state of facts: Gideon Carr was, upon trial in the court of common pleas, convicted of a crime and sentenced to imprisonment in the penitentiary. For the purpose of prosecuting error to the circuit court he had prepared by the official stenographer of the court a bill of exceptions, the expense of which was \$90, and this sum Carr paid to the stenographer. He thereafter presented to the Commissioners of Summit County a bill for said amount, which was rejected by the commissioners, and Carr took an appeal to the court of common pleas. Hearing was had in said last named court upon the following agreed statement of facts:

“First. That the bill presented to the board of county commissioners herein was for a transcript of the testimony for a bill of exceptions in the criminal case of *The State of Ohio v. Gideon Carr*, who was tried in this county for murder in the first degree, and convicted of murder in the second degree at the April Term, 1900.

“Second. Said cause was taken to the circuit court on error, said bill of exceptions being filed in the circuit court, and upon hearing, the judgment of said common pleas court was reversed by said circuit court.

“Third. During said April Term, 1900, of said court of common pleas, one W. H. Collins was the official stenographer of said Summit county, having been appointed by the Court of Common Pleas of Summit County, Ohio, at the September Term, 1899, at a salary of \$1,500 per annum.

“Fourth. Said Collins, as such official stenographer, took the testimony given upon said trial in the court of common pleas, and at the request of one E. F. Voris, attorney for said defend-

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ant, transcribed said notes into longhand, and thereupon demanded payment of said Voris for such transcript, whereupon said Voris, for and on behalf of said defendant, paid said Collins therefor \$90, being the amount due said Collins for said transcript at eight cents per 100 words.

"Fifth. That the population of Summit county by the federal census of 1880 was 43,788.

"Sixth. That said Collins, after his appointment as such official stenographer, drew his salary monthly from the county treasury of said Summit county and the clerk of courts taxes \$4.00 per day for the reporting in shorthand in the cases so reported by said Collins, which costs, when paid into the clerk's office, were by him turned into the county treasury."

And the court thereupon found and entered judgment against the plaintiff. To this finding and judgment plaintiff excepted, and by proper proceedings, brings the case into this court.

The judgment of the court of common pleas in this case is affirmed.

The question in the case is whether, where a prisoner, upon conviction of a crime in the court of common pleas, has a bill of exceptions prepared by the official stenographer of the court in this county, the county is responsible for the payment of the stenographer's fees.

In support of the contention on the part of the plaintiff in error, the case of *Clinton Co. v. Martin*, 65 Ohio St., 287, is cited, and it is clear that if the official stenographer of the court in Summit county were appointed under the same section as that under which the appointment is made in Clinton county, this contention must be decided in favor of the plaintiff in error. The appointment in Clinton county is made under Section 475, Revised Statutes, and this and the following sections, up to and including Section 481, Revised Statutes, make provision for the appointment of official stenographers, and require such appointment to be made by the judges of the courts of common pleas and probate courts.

Section 480, Revised Statutes, provides that:

"The fees of the official stenographers for making such transcripts shall be eight cents per folio of one hundred words, and shall be paid forthwith by the party or parties for whose benefit the same is ordered, and when paid shall be taxed as other costs

in the case; but all transcripts made in criminal cases and transcripts ordered by the court, where not asked for by the parties, shall be paid out of the county treasury, in the manner herein provided for the payment of fees for taking shorthand notes."

In *Clinton Co. v. Martin*, *supra*, the court held that under this last quoted section the defendant in a criminal case, having paid the fees of the stenographer for his transcript, was entitled to be reimbursed out of the county treasury.

The appointment in Summit county is made under Section 1 of an act passed March 8, 1893, and found in 90 O. L., 68. This section provides for the appointment of an official stenographer by the court of common pleas, and in that regard differs from the section under which the appointment was made in Clinton county. The section is an amendment to a statute found in 88 O. L., 190, and this is an amendment to Section 1 of an act found in 87 O. L., 92. The several sections found in 87 O. L., 92, together with the amended section under which the appointment is made in Summit county, make complete provision for the duties and compensation of the official stenographer.

Section 2 of the act which still remains in force, and is found in 87 O. L., 93, provides, among other things, that:

"It shall also be the duty of such stenographer to make, or cause to be made, at the request of either party, his attorney, or the court, an accurate transcript into longhand of the notes so taken in any case, to be paid for forthwith by the party or parties ordering the same, but no transcript of the notes into longhand shall be paid for out of the county treasury in any case, unless such transcript shall be ordered made by the judge trying the case for his own use, and in criminal cases by the prosecuting attorney."

It is conceded that if this section is to govern, the judgment of the court of common pleas was right. But it is urged that the entire law, as to appointment of stenographers in Summit and the other counties to which these last mentioned sections, in terms, apply, is unconstitutional because of its making classification of counties upon an arbitrary basis of population; that it is special legislation on a general subject matter, such as is inhibited by Section 26, Art. II of the Constitution of Ohio, which

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reads: "All laws of a general nature shall have a uniform operation throughout the state."

Whatever may be said as to the construction to be given to this constitutional provision under the recent decisions of the Supreme Court of the state, it seems a sufficient answer in this case to say that the statute under which the plaintiff in error makes his claim is equally obnoxious to this provision of the Constitution. And, further, that unless the statute under which the official stenographer for Summit county is appointed is constitutional, he has never been lawfully appointed, because if the appointment is to be made and the stenographer governed by the provisions of Section 475, Revised Statutes, *et seq.*, the appointment should have been made by the judge of the court of common pleas and the judge of the probate court acting together, so that either Summit county is without an official stenographer, or the official stenographer is in the performance of his duties under the statutes found in 90 O. L., 68, and 87 O. L., 93. In either case the plaintiff here would not be entitled to recover.

There is force in the argument made by counsel for plaintiff in error that this construction gives to one tried for a crime in certain counties of the state rights which are not given to him in Summit and some other counties, and there seems no good reason, in the nature of things, why this distinction should be made; but the Legislature has made it and has not thereby deprived those tried for crime of any constitutional right.

It can hardly with reason be said that the statute under which the stenographer for Summit county is acting is an injustice to one tried for crime, but only that a favor has been granted to those tried for crime in the counties to which the other statutes apply, which favor has not been extended to those tried in Summit county.

Whatever reasons may have influenced the Legislature in making this distinction, the court of common pleas followed the law as it is, and, hence, no error was committed and the judgment is affirmed.

Nathan Morse, for plaintiff in error.

H. M. Hagelbarger, Prosecuting Attorney, for defendant in error.

SALE OF MORTGAGED LIFE ESTATE.

[Circuit Court of Wood County.]

CHARLES W. SHERMAN AND LESTER D. HILL v. HATTIE MAY SHERMAN.

Decided, April 25, 1903.

Life Estate—Covered by a Mortgage—And Yielding an Income Insufficient to Pay Taxes and Necessary Improvements—Expenses of Sale—And of Reinvestment of Proceeds—How Distributed.

S, as the owner of a life estate which was under mortgage, petitioned for its sale and a reinvestment of the proceeds, on the ground that the taxes and necessary improvements exceeded the income. The court ordered a sale and appointed a trustee to reinvest the fund, directing that the costs, plaintiff's attorneys' fees, taxes due, and a fee to the guardian *ad litem* should be paid out of the fund, but refused to order that the present value of the mortgage be ascertained and the amount paid out of the fund, although directing that the amount due the mortgagee be paid out of the income arising from the fund, prior to the payment of any other claim or lien, except the cost of investing and caring for the fund.

Held: There is no authority of law for the payment out of the fund of the costs in such a case, or a fee to plaintiff's attorney, or the taxes, unless after a forfeiture is declared. The fee to the guardian *ad litem* was properly paid.

HAYNES, J. (orally); PARKER, J., and HULL, J., concur.

In this case a petition in error was filed by the plaintiffs in error to reverse the judgment of the court of common pleas, the general ground alleged being that the court erred in rendering judgment against the plaintiffs in error, Lester D. Hill and Charles W. Sherman, and in favor of the defendant in error, Hattie May Sherman.

The petition of Charles W. Sherman in the court of common pleas sets forth that his father died having made a will, and had willed to him for life certain real estate, about eighty acres of land, with remainder over to the heirs of his body. He had one child, Hattie May Sherman, the defendant. Sherman had with all reasonable promptitude mortgaged his life estate to Lester D. Hill, and Hill comes in by way of answer and cross-

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petition and sets up his note and mortgage. The plaintiff in his petition sets forth that operation of the land under his life estate is not profitable, that the taxes and improvements thereon required are high, so that it yields nothing to him, and can be in its present condition of no value to the owner of the remainder; that from the rents it can not be kept in repair with the necessary ditches, taxes and improvements, and is therefore depreciating in value, and he prays that the land may be ordered sold, and the proceeds invested under order of the court in accordance with the statute in such case, and averring that it would be no injury to the person holding the remainder in doing so.

After a hearing an order was made by the court of common pleas that a sale be made, and the plaintiff was appointed to make the sale, and a sale was made and the money was turned into court, and is there now. The petition also prayed that the present value of the mortgage given by Sherman be ascertained, and the same ordered paid out of the fund; the court refused to do that, and thereupon the plaintiff filed his petition in error.

We think the court is perfectly right in doing that; that it was a wise thing to do, and further that we do not find any provision in any statute that would authorize a court of common pleas to make an order of that kind, and so far as we can see, the court would have no authority to do so. The statute provides that the money made by the sale be invested in such and such a form. A sale was made and a certain party was appointed as trustee to take charge of the fund and make the investment. That was under the provision of the statute all right. The court further directs that certain payments be made, that the amount found due the defendant, Hill, upon his note and mortgage set forth in his answer, be paid out of the income arising from said fund prior to the payment of any claim or lien, except the costs of investing the same.

The court has done one thing, which is not alleged as error, but I will call attention to it, for so far as we know there is no law for the order that is made. The court has ordered the appointment of a trustee, that he shall give bond, and then when the bond is given to the clerk of the court "the amount of said fund

remaining to which said trustee may be entitled, after retaining the costs of this action, including a fee for plaintiff's attorney and also a fee for the guardian *ad litem* heretofore allowed, which costs are taxed at \$101.30, and the taxes due on the land amounting to \$26.75; and it is hereby further ordered that after the payment of said money due the said L. D. Hill on his note and mortgage the subsequent income arising from said fund be paid to said plaintiff, Charles W. Sherman after deducting such costs and expenses as shall be allowed said trustee," etc. Now the tenant for life is bound to keep the taxes paid, else he forfeits his life estate, and further we know of no authority for paying the plaintiff's attorney fee in this case; nor do we know of any law that the costs of the court be paid out of the fund, or the taxes, unless they should be paid after a forfeiture is made. The fee of the guardian *ad litem* should be paid out of the fund.

The whole thing is carried through here at the expense of this girl, a minor. The plaintiff, and Hill, the owner of the mortgage, are not out a cent. The sale is made for the benefit of the plaintiff, and upon his petition, and we know of no reason why he should not pay his own attorney fee and why he should not pay the costs of the suit, or why the mortgagee should not pay the taxes, or the whole amount should be forfeited. I do not care to have the matter pass by this court without entering our views upon the question.

The judgment of the court of common pleas so far as his order appointing a trustee to invest the funds and refusing to find the present value of the mortgage and pay it, is affirmed.

P. J. Chase, for plaintiffs in error.

E. G. McClelland, for defendant in error.

EXHIBITS UNATTACHED TO BILLS OF EXCEPTIONS.

[Circuit Court of Erie County.]

HURON DOCK CO. v. MAGGIE SWART, ADMINISTRATRIX, AND MYRON T. HERRICK AND ROBERT BLICKENSBERGER, RECEIVERS OF WHEELING & LAKE ERIE RY. CO.

Decided January 19, 1903.

Bills of Exceptions—Can Not be Amended After Being Signed—By Attaching Exhibits Left Unattached or Imperfectly Identified—But if Not Correct, or Otherwise Deficient, Such Exhibits May Be Disregarded—And the Case Reviewed on Weight of the Evidence—Materiality of Exhibits—Identification of—Questions of Negligence Where a Night Watchman Was Run Over in the Yard He Was Watching—Amendment of Petition After Verdict.

1. The identification of an exhibit by marking it "Ex. 1" with the number of the case on trial and the initials of the official stenographer, is not so clear and unmistakable that the exhibit may thereafter be regarded as constructively attached to the bill of exceptions.
2. A bill of exceptions can not be amended or corrected after the time for its being signed has expired, by attaching maps or plats submitted in evidence as exhibits at the trial below, but not physically attached to the bill or properly identified as belonging to it.
3. But where it appears that such maps or plats were not correctly drawn, and contained no marks indicating the courses and objects pointed out to the jury upon such maps, they do not constitute a material part of the evidence, and a reviewing court is at liberty to consider the case on the weight of the evidence without regard to such maps.
4. To permit, after the verdict has been returned, an amendment to the petition, which presents facts and issues not submitted to the jury or referred to in the charge of the court is error.
5. Where the night watchman on a coal dock, while crossing railway tracks with the location of which he is familiar, is struck by a car which, from the sound at the "tipple," he should have known was moving in that locality, without a light being carried upon it, he is guilty of contributory negligence, and there can be no recovery on account of his death.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Error is prosecuted to a judgment of the Court of Common Pleas of Erie County. The action in the court below was brought by Maggie Swart as administratrix of John Swart, on account of the death of her husband from injuries received while in the employ of the Huron Dock Company, which death she charges was due to the negligence of the Huron Dock Company, and also to the negligence of the receivers of the Wheeling & Lake Erie Railroad Company. She recovered a judgment for \$5,000 against both companies. The petition in error in this case is filed by the Huron Dock Company, asking for a reversal of this judgment, and the receivers of the Wheeling & Lake Erie Railroad Company have filed a cross-petition in error, also asking for a reversal of the judgment.

The accident happened upon the docks of the dock company in the village of Huron, in Erie county. It appears that at their docks they have tracks and the ordinary appliances and facilities for unloading coal from flat cars and loading the same into vessels drawn up alongside of the dock; that at a certain point upon their tracks is an appliance called a tipple that in some manner seizes the car and tips it, dumping or emptying the contents into buckets, whereby the same are carried thence into the vessel; that the railroad company delivers the loaded cars at this point upon the dock, to-wit, at the tipple, where they are received by the dock company and emptied and then run upon certain other tracks, where the railroad company receives and takes them away in the form of trains of empty cars.

The plaintiff in her petition avers that John Swart, the decedent, was employed by the defendants (but the evidence shows that his employment was by the dock company), and complains that on the occasion when this accident happened, which was in the night time, about midnight, the docks were not properly lighted, so as to make it safe for one engaged as deceased was engaged in working for the company; that they were not sufficiently lighted to enable one engaged as he was to observe moving cars upon the dock tracks. The petition also charges that the safety of decedent required that all such cars should be equipped with good and sufficient brakes, so that the same could

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be stopped within a short distance and persons would not be injured by said cars; that the safety of decedent further required that the defendants should have and enforce certain rules by which a warning of the approach of cars would be given by a whistle or bell, or by some other means to men who might be upon the side-tracks; that upon the occasion of this accident, to-wit, on July 28th, Mr. Swart, who was engaged as a night watchman, and whose duty required him to be upon the docks, was required by his superior, a foreman in the employ of the dock company, to leave a position of safety that he occupied at a certain shanty, and cross certain tracks to another point to the northward and eastward of that place, to an oil house and there obtain coal oil with which to supply certain torches that were then in use upon the docks for the lighting of the same. It appears that one of these torches was beginning to burn low, in consequence of the supply of oil failing. The petition charges that while Swart was thus in the performance of his work, the defendant did wrongfully, carelessly and negligently cause a railroad car to be run upon said track without giving any warning to said Swart of its approach; that the defendants were further careless and negligent in that the brakes on said car were in such defective condition that the man upon said car at said track was unable to control the movements of said car. The petition does not point out the defects, but avers that plaintiff does not know the nature of the defect, and that it was well known to the defendants that there was such a defect in the car, or that it had existed for such length of time that the defendant ought to have known of its existence.

The petition further charges that the defendants were careless and negligent in that they had failed to provide good and sufficient lights by which to perform such work, and a rule by which men in charge of the engines and cars in said yard and in charge of said work were required to give warning to the said deceased of the approach of cars; that while deceased was thus about his work, and in the act of going along and across one of the said tracks, said car which had been thus set in motion, ran down and upon him, and struck him, throwing him upon the track and running over him, inflicting injuries that caused his

death soon thereafter; that no bell was rung, no whistle sounded, or other sufficient warning given to said decedent of the approach of said car; that the injuries were received in the night time when it was dark, and decedent was unable to see the approach of said car; that he did not know and had no means of knowing that said car was defective, and was approaching on said track, and that he was without fault contributing to the injuries thus received.

The separate answers of the defendants respectively deny all these charges of negligence, and aver that the decedent was guilty of negligence contributing to his injury. The motions for a new trial on behalf of the defendants below, respectively, are identical in form, and they set forth as grounds for a new trial: (1), That the verdict was against the weight of the evidence; (2), that the damages are excessive and appear to have been given by the jury under the influence of passion and prejudice; (3), that the court erred in rejecting evidence offered by the defendants; (4), in receiving evidence offered by the plaintiff; (5), in its charge to the jury; (6), in refusing to charge in writing before argument as requested by the defendants; and (7), on account of misconduct of the jury and of the plaintiff.

Now we are met at the threshold with the suggestion on behalf of the defendant in error, Swart, that the bill of exceptions is not sufficiently complete to authorize the consideration of such questions as require the weighing or examination of all the evidence. Certain plats or charts were introduced in evidence that are not physically attached to the bill of exceptions; and our attention has been called to decisions by this court and by other circuits courts of the state to the effect that charts or papers of this description used in cases of this character and introduced in evidence must be attached to the bill of exceptions, and thus brought up to the reviewing court; and the law appears to be very distinctly laid down in those cases, where papers are of a character and are used in such way as that the jury had before it competent evidence in the form of plats or maps that would aid it in the consideration of the evidence, and the same are not presented to the reviewing court, the latter court is without

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power to consider the case upon the weight of the evidence; that such papers must be attached, either physically, or, where that is inconvenient, because of their bulk or for any good reason, they must be constructively attached, and in the latter case the reference to the same must be so explicit and the plats must contain in and upon themselves such clear and unmistakable evidence of identity as to make it certain that they are the same plats referred to in the bill of exceptions. I refer especially to the case of *Michigan Cent. Ry. Co. v. Waterworth*, 21 C. C., 495, *Foster Coal Co. v. Moherman*, 9 C. C., 544, which will be noticed again in the course of this opinion. We are not disposed to depart from the rules laid down in these cases, though it must be admitted that such plats, used as aids to enable the jury to understand and apply the evidence, very much as a view of the premises is used, do not stand upon the same footing as documentary or oral evidence, and their production does not seem to be in all instances absolutely essential or indispensable. But more will be said on this head further on.

Now we have evidence here in the way of affidavits filed on behalf of all the parties upon the question whether these plats were ever attached to the bill of exceptions, that is to say, physically attached; and from this evidence it appears entirely clear they were not; that counsel preparing the bill of exceptions presented it to counsel for the opposing side for examination and to the trial judge for allowance, without the plats being attached. According to his affidavit, he called attention of opposing counsel to the fact that the plats were not then attached, and stated that it was his purpose to attach them, and no objection was made to his doing so. But upon that point there is some conflict in the evidence; the other attorney testifying that he does not remember that anything of that kind occurred. It is undisputed that counsel preparing the bill of exceptions carried it to the clerk to be filed, and that the plats were at that time in the possession of the clerk, part of the archives or files of the office, and that he was directed to attach them and agreed to do so, but finding it inconvenient to have these large plats attached to the bill of exceptions, he failed to attach them, put the plats in one place and the bill of exceptions in another place, and, dur-

ing the cleaning up of his office, the plats were carried to another part of the court house and placed in storage for a time, while the bill of exceptions was regularly filed in his office; but the plats were never physically attached to the bill of exceptions. Such articles may be attached as I have indicated, by reference to them in the bill of exceptions, if the means of identification, taken in connection with the reference, appear upon the face of the plat. But a majority of the court are of the opinion that the means of identification do not appear with sufficient clearness upon the face of these plats; we are unanimous in that view as to the plat called the "blue print," which has upon it simply the mark, "Ex. A." This, according to the testimony of the court stenographer who took the testimony in the case, is not in his handwriting. Neither the number of the case, nor the title of the case appears upon the plat, and we are not advised as to who put upon it the letters, "Ex. A." The other plat, however, of a light color, has marked upon it by the stenographer who took the testimony in this case the figures 8958, which is the number of this case in the Common Pleas Court of Erie County, also "Ex. 1," indicating Exhibit No. 1, and the initials of the stenographer, "W. H. W.," for W. H. Watts. One member of the court is of the opinion that this affords sufficient means of identification of the plat appearing upon its face, in connection with the testimony of the witnesses as to the nature of the plat and the reference in the bill of exceptions to a "light colored plat," which appeared to have been marked Exhibit No. 1 and introduced in evidence. But the majority of us are of the opinion that more than that is necessary to distinctly identify it, so that it might be said to be attached by reference. The number of the case, the title of the case, and the court, we think should appear, though we are not prepared to say that all of these things must appear as means of identification. Here we have neither the title of the case, nor the name of the court.

Now counsel for the receivers and the dock company interpose a motion for leave to bring up a more perfect record upon suggestion of diminution of the record to enable them to apply to the court below to have the bill of exceptions amended in this particular, either by having the plat physically attached or by

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having them attached by distinct and explicit reference, and they ask for a postponement of further consideration of the case pending such proceeding. This motion we will allow to be filed, as of the term. This motion, however, should not be granted by this court, unless we would sustain the amendment, if made; in other words, if we are of the opinion that the court of common pleas is without power to permit or order the amendment, of course we should not postpone consideration or decision of the case, in order that application for such amendment may be made.

In this state there has been a high degree of strictness in the holdings with respect to the observance of the rules prescribed for perfection of the bill of exceptions; it seems to have been treated as a peculiar part of the record, as if there was some sort of sacredness attaching to a bill of exceptions, not affecting other parts of the record, so that it can not be changed or amended, or anything whatever done to save a case dependent thereon, unless it has been fully prepared within time, signed, sealed and filed and a journal entry of its allowance put upon the journal. In other jurisdictions, however, the holdings have not been so strict upon the question of the amendment of a bill of exceptions. 2 Thompson Trials, Section 2828, says, as follows:

“A bill of exceptions being a judicial record, the power to amend it stands upon the same footing as the power to amend other judicial records. Being a record, it must carry with it its own verity, and, if defective, *can not be amended by affidavits* or other extraneous evidence. If *improper entries* are made in the bill by a misprint of the clerk or of counsel, great difficulty will attend the correction of them. In a case in Arkansas the clerk inserted instructions in the bill which were not intended to be therein inserted. The Supreme Court said: ‘The efforts to correct this by *certiorari* are futile. If not brought into the record by the bill of exceptions, the instructions can not be noticed. This court, on appeal, can act upon the record alone, and must act on what appears there. Although entirely satisfied, as men, that his honor, the circuit judge, did not give the instruction contained in the transcript, in the connection shown, and that he did give other instruction, which, whether erroneous or not, were certainly pertinent to the issue, we can not know it judicially. It was error to give the instructions as they appear.’ And the court accordingly reversed the judgment, for

the giving of instructions which the judges, *as men*, knew had never been given. This seems to be carrying what is termed 'technicality' to an extreme. There surely ought to be some way by which such misprison can be corrected. There is a very simple way. The rule which obtains in Missouri that, even after an appeal or writ of error, the court below retains jurisdiction over its own record for the purpose of amending it, should be applied in such a case; and the appellate court should, on application, postpone the hearing of the case until the trial court can have the opportunity of amending its bill of exceptions, which, as thus amended, can be brought to the appellate court by a *certiorari*. The record is in the breast of the judge during the term, and the court may then freely amend it, so as to make it conform to the facts; but, after the lapse of the term, it has so far passed beyond his authority that he can not amend it unless some written memorial remains to amend by. This principle has been frequently applied to the subject of amendment of bills of exception. 'It can not be supposed,' said Owsley, J., 'that the power of the court over bills of exceptions absolutely ceases upon their signing them, and if it does not, the only limitation in point of time for the exercise of that power must be at the end of the term at which exceptions may be filed.' "

The decisions of the Supreme Courts of Indiana and Kentucky support these views. We find a case decided by the Superior Court of Cincinnati in 1859 in harmony with this view, which seems to us to contain a great deal of sound sense. The case of *Hazlewood v. Parker*, 2 Disn., 429, was there held as follows:

"The power of amendment, in the general terms, conferred by the code (Section 137) extends as well to a bill of exceptions as to any other part of a record, when the proposed amendment is in furtherance of justice."

It appears that a certain paper was introduced in evidence, which was marked "Exhibit A." The transcript was sent up to the Supreme Court, and it was there discovered for the first time that the exhibit had not been attached to the bill of exceptions. Thereupon application was made to the superior court for leave to amend the bill of exceptions, and Gholson, J., said:

"I know of no reason why the power of amendment, in the general terms, conferred by the Code, Section 137 (Section 5114, Revised Statutes), should not extend as well to a bill of exceptions as to any part of the record, when the proposed amendment is in furtherance of justice, and will prevent a party from

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being tripped up by a technical objection. The only objection is whether, in such a case as this, there is anything to amend by, and I am clearly satisfied there is. The paper which is found in the file is shown, by clear and inherent evidence, to be the one intended to be marked and attached, and I shall, therefore, direct it to be done."

The judge calls attention to some authorities and there is some further discussion of the question.

Here, while the plats referred to do not contain this inherent evidence of identity, the evidence submitted to this court satisfies us beyond doubt that these are the identical plats that were submitted in evidence as exhibits (Exhibit 1 on behalf of the plaintiff, and Exhibit A on behalf of the defendants), and if the power to amend resided in this court we would proceed without hesitation to permit the amendment; or, if the power to amend should reside in the court below, we are of the opinion that the court would be authorized to proceed upon this evidence and permit the amendment to be made.

But we find that in the case of *Busby v. Finn*, 1 Ohio St., 409, decided in 1853, not referred to by Judge Gholson, but referred to by other courts which has assumed to follow it, the power to make such amendment is denied. The syllabus reads:

"To make a paper a part of a bill of exceptions it must be incorporated in it, or attached to it, or filed with it, and so described as to leave no doubt of its identity. When not so made a part of the bill the defect is not cured by a journal entry directing it to be taken as a part thereof.

"A bill of exceptions must be signed and sealed at the term at which the exception is taken, and it can not be amended after that term. A *nunc pro tunc* order made at a subsequent term to the effect that a paper not identified by the bill shall be considered as a part of it is a nullity."

The opinion is by very eminent authority, Judge Thurman, and he has this to say touching the necessity of physical attachment or clear identification of documentary evidence, page 411:

"Among the papers before us are certain papers marked respectively A, B, C, D, E, F and H, but neither of them is, in any way, attached to the bill of exceptions, nor does either of them bear any file mark of any court, nor are they, or either of

them, referred to in the pleadings, or verified or even alluded to in any return or certificate of the clerk of the common pleas—in a word, we have nothing whatever from which we can properly take notice that these papers are the same papers mentioned in the bill of exceptions. We do not mean to say that it is indispensable to copy into, or actually attach to, a bill of exceptions every paper making part of it, though *Hicks v. Person*, 19 Ohio, 446, seems to require this. Such a description may be given of an exhibit as to leave no doubt of its identity when found among the papers; but, on the other hand, the description may be so loose that of a number of papers each one will satisfy it just as well as any other. Thus, in the present case, the bill states that 'the defendants gave in evidence the record of the judgment in Marion county hereto attached, marked 'A,' but no such record is attached or marked as filed, or mentioned in the pleadings, or referred to in any return or certificate of the clerk of the court. It is therefore manifest that *any* record of *any* judgment of *any* court in Marion county, and between *any* parties satisfied the description in the bill of exceptions, provided it is marked 'A.'"

He says substantially the same with respect to the other exhibits; then as to an attempt made to reform the bill of exceptions, after giving a copy of a journal entry, designed to affect that purpose, he says, page 414:

"This is certainly a curiosity in the history of judicial proceedings. The statute requires a bill of exceptions to be signed and sealed at the term at which the exception is taken, and it can not be done afterward (43 O. L., 80; *Hicks v. Person*, 19 Ohio, 426). But if the plan here attempted is permissible, signing and sealing are unnecessary, and a mere journal entry will answer for a bill of exceptions, and instead of the bill being perfected at the term in which the exception is taken, as is required by the statute, it may be completed at any subsequent term, even after the original papers are in the court of errors by a *nunc pro tunc* order, and that made by different judges from those who signed and sealed the bill. Such a proceeding is wholly unauthorized, and the order in question is a nullity."

Now that decision does not appear to go necessarily, or otherwise than as *obiter dictum*, beyond the method there pursued in attempting to amend a bill of exceptions, to-wit, by a *nunc pro tunc* order, or journal entry; yet it contains the general statement that an amendment can not be made after the term, which,

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under the statute as it now reads, would be equivalent to saying after the expiration of the fifty days provided by law. But as I have said, other courts have relied upon that decision and construed it as holding the law to be as stated in the general language referred to, that an amendment of a bill of exceptions can not be made at all, or at least not after the expiration of the time fixed for its allowance.

In the case of *Pittsburg, C. & St. L. Ry. Co. v. Hart*, 10 C. C., 411, decided by the Circuit Court of Hamilton County, it was held that:

“To make a paper a part of a bill of exceptions, it must be incorporated in it, or attached to it, or filed with it, and so described as to leave no doubt as to its identity. When not so made a part of the bill, the defect can not be cured by obtaining an entry in the trial court at a subsequent term, directing it to be taken as a part of the bill.”

Reading from the opinion:

“It was claimed in the court of common pleas, by the plaintiff in error, that defendant in error’s right to recover must be governed by the law of Pennsylvania. And the law of Pennsylvania, as stated in 96 Pa. St., was offered in evidence, but within the time allowed for signing the bill of exceptions it was not made a part of the bill of exceptions. Upon the trial of the case in this court this omission was pointed out, whereupon counsel went to the court of common pleas, and upon motion at a subsequent term the correction was made, and the bill of exceptions amended. Could this be done? We think not. We are not aware that the rule laid down in *Busby v. Finn*, 1 Ohio St., 409, has ever been changed by our Supreme Court. It seems to us that the second paragraph of the syllabus in that case is directly in point, as well as the language of Judge Thurman in his opinion on page 414. If we are correct as to this matter, we can not consider the question attempted to be raised. Neither can we consider the question of error, that the verdict is against the evidence, as all of the evidence is not before us.”

And in the case of *Haberty v. State*, 8 C. C., 262, also decided by the Circuit Court of Hamilton County, there is a like holding. The third paragraph of the syllabus is as follows:

“Where, in a proceeding in error, it is alleged that the bill of exceptions as signed by the trial judge, does not contain all

of the evidence which was heard at the trial, and a motion is made that it be returned to the trial judge for correction in this respect, the time allowed by law for the signing of a bill of exceptions in such case having expired, such motion should not be granted. The trial judge has now no right to correct the old or sign a new bill of exceptions."

Now we feel constrained to follow those decisions of the Circuit Court of Hamilton County, and rely upon their construction of this decision by the Supreme Court of Ohio, and therefore we overrule the motion for leave to correct this bill of exceptions in the manner desired, and exceptions to this order will be noted.

But that does not wholly dispose of the matter. It remains to be considered whether the plats are a material part of the evidence. The language of some of the decisions seems to be to the effect that if anything is introduced in evidence and is omitted, that is the end of the inquiry. But we are of the opinion that where it is made to appear that the omission is wholly immaterial, such omission should not deprive the plaintiff in error of his right to have his case reviewed upon the weight of the evidence. We are presented with a copy of the printed record in the case of *Aetna Life Insurance Co. v. Kosterman*, recently before the Supreme Court of this state. It appears that that was an action to recover upon an insurance policy, and the question arose as to how the deceased came to his death, whether he came to his death in such manner as that the insurance company was liable under its policy or not; and in the course of the trial Gray's Anatomy was used in the examination of expert witnesses. A doctor was asked if it was one of the standard medical and surgical works, and answered: "It is." Question: "I will call your attention to these plates and ask you what they represent?" (exhibiting certain plates or charts of the human anatomy appearing in the book). Objection was made. The court inquired: "What is it for?" Counsel answered: "To make it plain to the jury by means of the picture." The objection was thereupon overruled, and defendant excepted and the answer was: "These two plates represent the spinal cord stripped of its nerves and this plate represents the lower portion of the

spinal cord with the nerves attached." The plaintiff then offered the plates in evidence; objection was made to this, which was overruled upon his answering that "the drawing is a correct representation." Now counsel, in preparing their bill of exceptions, failed to attach the plates. The case went to the circuit court, and the circuit court held that it did not have all of the evidence before it, and that, therefore, it could not consider the case upon the weight of the evidence. Error was prosecuted to the Supreme Court, and that court, on the twenty-fifth day of last November, as appears from 47 Bull., 848, held as follows:

"Judgment is vacated and cause remanded to the circuit court with instructions to consider the bill of exceptions as to the weight of evidence, there being no material omission."

We are not enlightened by the Supreme Court as to why it considered this an immaterial omission; it may have been considered by the Supreme Court that it was not admissible; but their decision on this point amounts to a holding that where it appears that the part omitted is immaterial, it still devolves upon the reviewing court to consider the case upon the weight of the evidence. So we have proceeded to inquire whether in this case it appears that these plats referred to, which are omitted from the bill of exceptions, were a material part of the evidence.

Now I have already given a general statement of the cause of action and the *locus in quo*, and the fact that it appears that the deceased came to his death while upon certain tracks lying between the shanty, so called, where he was found by the foreman who directed him to go and get the oil, and the so-called oil shanty upon the other side of these tracks. A large part of the testimony of the witnesses, especially those on behalf of the plaintiff, is taken up with a description of these docks, and the tracks and other structures upon the docks, including the apparatus used for unloading the cars; and it seems to us that the description of the relative positions of objects, as given by the witnesses, of courses and distances, of the sizes of objects, etc., is so clear when we come to look into the testimony, that any

fairly intelligent person, such a person as a jurymen is supposed to be, could sit down and make a fairly correct plat of the ground, or a plat sufficiently correct for the purposes of the case. It appears that the general direction of these various tracks upon the docks is north and south; that upon the easternmost of these tracks the loaded cars are brought up a grade to the tipple; that there they are unloaded; that when a car is there unloaded, another one is brought up and run against the empty car, and that it bunts it or moves it off of this part of the track onto a down grade toward the north; that at that point a person in the employ of the dock company takes charge of and gets upon the empty car to manage the brakes and to direct the movement of the car; to direct its course, control its speed and attain the ultimate object of bringing it upon certain of these tracks to the westward, where the empty cars may be taken again by the railroad company and hauled away. The car pursues its course toward the north on a down grade, being run by gravity; on reaching a certain point to the north it is stopped and turned so as to go upon these western tracks, and then by force of gravity it pursues its course toward the southward again and comes upon one of the four certain tracks lying to the westward of the track from which it has been taken; the particular track of these four upon which it shall be placed depends upon the direction given to it by the person upon the car, and the management of the switches that determine the course of the car is under his control and a matter of his discretion.

It is evident that this car had been unloaded at the tipple, brought to the extreme point at the north, started again on its course toward the south, to be put upon what is called here the "third" track of those lying west of the engine house, the shanty, the tipple, etc., that is to say, the third track beginning to count from the east of these four tracks. It was while it was being brought upon the third track to be deposited there that it ran upon the deceased and killed him.

As to the use made of these plats and as to their character, as shown by the bill of exceptions, without the aid of extrinsic evidence, we call attention to the reference made thereto by wit-

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nesses and by counsel upon the trial. I should say, however, to render the plats admissible in evidence, it is necessary that there should be evidence of their accuracy and reliability, such as was required by the trial courts in the case of *Aetna Life Insurance Co. v. Kosterman, supra*; Jones on Evidence, Section 414.

Now the witness, Jamison, on behalf of the plaintiff, in his direct examination on page 4, refers to one of the plats. He is being examined by Attorney Thatcher on behalf of the plaintiff, who says:

"I will ask you to take hold of one end of *this drawing that I have attempted to make*. There is a place here marked shanty. What does that represent?"

He answers:

"It is a small shanty; we called it a winter shanty; it was for the men to stay there when they were working or when they were called out to go to work."

Now there was further testimony in the case, from which it appears that a plat, introduced as plaintiff's Exhibit No. 1, was a plat which the attorney for the plaintiff had made, or, as he says in his question, "attempted to make." It further appears in the case that he had not completed his attempt at the time he was making use of the plat; that much we ascertain from an examination of the bill of exceptions. Though we need not do so, we have no doubt but we have a right to examine these affidavits and exhibits, to determine whether the evidence submitted was material, it appearing that the maps are clearly identified. And we find upon looking at the plat itself that it is what the attorney's question would indicate, a rough sketch that he probably made with a pencil during the trial of the case, and such a sketch, so far as appears, as any member of the jury may have made, and was well qualified to make by information touching the *locus in quo* after the oral evidence was in.

The witness, Vina, in his cross-examination, page 48, is examined with reference to the "blue print" by an attorney for the defendants, as follows: "I wish you would examine this blue print, Mr. Vina. This is the tipple, I will ask you if the shanty would be *about* in there (indicating). *This* is north. *This* is

supposed to be the four tracks." Answer: "Yes, I guess that would be about right."

Question: "I will ask you if the oil house would not be *there?*" Answer: "The oil house would be *across these tracks.*"

Question: "What was there to prevent Mr. Swart from crossing the track *there* and coming up *here* with his oil?" Answer: "There was nothing to stop him from crossing the tracks *here.*"

Question: "That would be just as soon as going across the track *there* as to come down *here* and cross *these four tracks?*" Answer: "It probably would."

It will be observed that something was done in the way of indicating upon the map, as the stenographer puts it, and perhaps pointing out objects upon the map; but it does not appear that any mark was made upon the map or anything done that would assist this court in determining what was indicated to the jury by the use of the map. If the map was presented here to this court, how would the court be aided by the indicating that was done by the witness or by the attorney in the course of his examination? If they had indicated by making marks when they referred to it in the course of the testimony, as a cross figure or letter, or anything of that sort, then that kind of evidence would be of some aid to this court, when it comes to weigh the evidence. It is to be remembered that this court is to be put in possession of such evidence as will aid it, and give it, so far as possible, the same advantages that the jury had in weighing the evidence. It is quite evident that this sort of reference to the map would be of no possible use to the court, and that it would make the testimony no more intelligible with the map before us than it would be without the map. It is impossible to say what points or localities were referred to by counsel and witness as "*here*" and "*there,*" etc.

On re-direct examination Vina testifies (page 53 of the record), that the blue print shows four tracks back of what is marked as the engine house, and that there was another track there at that time, which is not indicated upon the blue print. Now that is drawn out by the cross-examination. No witness testifies that the paper is a correct representation of the situa-

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tion. This witness, however—on behalf of the plaintiff—indicates that in one respect, at least, it is an incorrect and incomplete representation. The witness, Parker (page 61), seems to have made some use of the blue print. He was asked what course the men took when they went from the shanty over to the oil house. He answered: "Generally they would go just like *that*, as near as they could" (indicating on blue print). Now how would that blue print, with that kind of testimony, aid the court at all in weighing the evidence or even in ascertaining what the witness meant or indicated or pointed to when testifying.

In looking at the part intended to represent the shanty we see that it is no part of the blue print proper, but appears to be indicated in ink by some "pretice hand." The light-colored plat contains no clear indication of the points of the compass nor any scale by the use of which sizes or distances can be ascertained. In the cross-examination of Atkins (page 75) there is some evidence of the same character (indicating the place), but how he indicated, or that he caused any mark to be made on the blue print by which the court reviewing the case can see the point indicated, does not appear.

The witness Knowleton (page 111) is the last one to whom I shall refer on this head, and the pages referred to are, so far as we can discover, the only instances in which any references are made to either of these maps. Knowleton is asked with reference to the blue print by counsel for plaintiff: "I will show you a plat. You may state whether the square marked 'dumper' represents where the tippie stood and the square marked 'oil house' where the oil house stood. State if that represents the relative positions of the dumper and the oil house?" Answer: "*Nearly so.*"

Question: "With reference to these tracks, Nos. 1, 2, 3, 4, what is the facts as to their being *parallel and closer together than shown on the map?*" Answer: "I should say they were uniformly the same distance apart."

Upon looking at the plat we find that they are not a uniform distance apart, but almost run off on tangents, so that counsel succeeded in showing that both of the plats were incorrect. That

the maps were introduced in evidence appears at page 130 of the bill of exceptions.

In the case of *Michigan Cent. Ry. Co. v. Waterworth*, 21 C. C., 495, where we held that the omission of a map or plat used upon the trial of a negligence case was a material omission, and therefore we could not consider the case upon the weight of the evidence, this is said:

“One of the grounds of the motion for a new trial, and a ground that is now urged here on error, is that the verdict was against the weight of evidence. Upon looking into the bill of exceptions we find this condition: that there was a drawing used upon the trial, which appears to have been a diagram of the grounds where the tracks of the company were, showing the tracks, etc., where this accident occurred. This question of the location of the cars, and of their movements upon this occasion, became material. Witnesses were interrogated with respect to the position of certain cars, and in undertaking to state where the cars were situated and how they were moved, in order that their testimony might be understood by the jury, they were asked to dictate those positions and movements upon the map, which they did, and it appears from the record that in certain instances they made marks upon the map to indicate the positions about which they had testified, so that the map, after it had been thus identified and used, was a material document and piece of evidence in the case.”

In the other case referred to where a plat was used. *Foster Coal Co. v. Moherman*, 9 C. C., 544, decided by the circuit court of the seventh circuit, in the opinion Judge Laubie said:

“So far as the verdict is concerned, we are not prepared to say but that it is right, but at all events we should not be at liberty to consider that question for the reason we do not have all of the evidence before us that was before the jury in the court below. They used a map largely in the testimony of this case, and witnesses pointed to it, pointed places out upon it, horse backs in the mine here and there, etc. It was patent and plain to the jury, but it was entirely unintelligible to us, so that in any event we could not examine the question whether the verdict was sustained by the weight of the evidence or not; but so far as it is disclosed, and treating these matters as to the map as immaterial, we do not see how the jury could have done anything else than what they did.”

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So it appears that the view of that court was that the map was of such a character that the court would have been aided by looking at it, would have been placed in the same position as the jury, having the map before it, and that the evidence submitted, unaided by the map, was unintelligible. We are clear that that is not so and can not be said with respect to the maps here mentioned.

We therefore hold that the maps are not a material part of this evidence; and that we are at liberty and are bound to consider this case upon the weight of the evidence.

Now the jury was asked to answer certain interrogatories, the purpose evidently being to have them indicate the respects in which they found the defendants respectively guilty of negligence, if they found them guilty of negligence, and in their answer to the second interrogatory they say in effect that the only fault they find on the part of the receivers of the railroad company was in turning over to the dock company a car with a defective brake. The witness, Charles E. Mindus, called on behalf of the plaintiff, testified that at the time the accident happened he was riding this empty car; that he saw the deceased somewhere from sixty to ninety feet to the southward of him as he ran upon track No. 3; that deceased was upon that track; that deceased appeared to be carrying a lantern in one hand and a bucket of oil in the other hand; that he appeared to be crossing the track in a southeasterly direction, which would be directly across from the oil shanty to the other shanty where he would fill the torch. Mindus says he cried out to Swart with all his might, to alarm him and warn him, so he would get out of the way; that he attempted to apply the brakes to the car; that if the brake had been in good condition, he would have been able to stop the car within three car lengths, or, as he says, within about ninety feet, but that the chain fastening in some way the brake shoe to the brake staff was defective or imperfect in that it was too long; that by twisting up the brake he was not able to bring the brake shoe with sufficient force against the wheel so as to cause it to operate as a perfect brake; therefore he was not able to stop the car in the distance he could have stopped it if the brake had been in good order; that the car

ran upon the deceased, and the front trucks of the car ran over him—I believe the car stopped as the back trucks reached him and rested upon his shoulders, or some part of his person. Mindus was permitted to testify that if the brake had been in good order he would have been able to stop the car before it struck the deceased.

With respect to the dock company, in answer to the sixteenth question, the jury say that it was guilty of negligence in not having a light on the front end of the car. It will be observed that that had not been charged as a ground of negligence against the defendant, the dock company. But after this verdict came in, the plaintiff below asked and was granted leave to amend his petition so as to set this up as a ground of negligence against the dock company, ostensibly to make the pleadings conform to the evidence. Nothing of that character was submitted to the jury or referred to in the charge, and we are of opinion that to permit such an amendment after the verdict, under the circumstances, was an abuse of discretion. It gave the defendants no opportunity to defend against the charge by showing, as it might have done, that such lack of light was not a proximate cause of the injury.

Beyond that it appears that the deceased had been in the employ of the dock company for something like ten years in various capacities; that among other things that he had done in the course of his employment he had ridden upon these empty cars; he had performed the same duties that the witness, Mindus, was performing upon this night; that the lights upon the docks were of the usual character used; that the method of operation of the cars was the method that had been in use there for years, and that deceased was entirely familiar with the whole situation and with the methods pursued by the dock company in the operation of its cars and its work generally. It appears that it had not been accustomed to using lights upon the ends of the empty cars being run in upon these side-tracks to give warning to anybody or for any purpose, and that deceased must have known this—no doubt but he knew it; he was acquainted with the situation and necessarily acquainted with the risks incident to the method in vogue there of doing this work, and it did not require an expert

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person, but only a person of ordinary sense and observation, upon becoming acquainted with the method, to become at the same time aware of the dangers incident thereto. He had not only learned this while in their employment, but he had upon one occasion quit their employment for a while and had then again, with full knowledge of these things, accepted employment and resumed his work there.

It appears to us very clear that if this absence of light on the cars were charged as negligence on the part of the dock company, it was one of the assumed risks of the employment of deceased, and that his administratrix can not recover on that ground.

Now as to the receivers of the railroad company. Whether the car brake was so defective that the car could not be stopped in the usual distance of three car lengths, is somewhat doubtful; only one witness testified to that—the witness, Mindus. It appears that he made no statement of any defect in the car on the night that the accident happened or about that time to anybody, so far as we can discover from this evidence. It would seem to be quite natural upon the part of one in his situation, his car having run a man down and killed him, to make a statement of that kind, if the facts warranted it, in exoneration of himself. He not only does not make any statement orally at or about that time, but subsequently, upon making a written statement of the circumstances of the accident, he makes no mention of defective brakes. But when he comes to testify in this case, he tells about the defective brake. Another witness testifies that he inspected the car on the next morning, and that there was no defect in the brake, but there may be some uncertainty about whether this witness found the very car that caused the death of the deceased. But I say that it appears somewhat doubtful whether the brake was defective; not only because of the long silence of Mindus on the subject, but because of the statement of Mindus that he could have stopped the car, if the brake had been in good order, in about three car lengths, and the fact that it appears that he must have stopped it within about that distance; though it is claimed that the body of the deceased under

the wheels of the car had something to do with the stopping of the car.

Now, if the plaintiff can recover from the receivers of the railroad company because of a defective brake, it must be on the theory that the receivers owed to the deceased the duty of keeping these brakes upon the cars that it turned over to the dock company in such condition of repair that deceased, if he put himself in peril while walking upon, or across the tracks, on such an errand as he was then engaged in, might be saved by the prompt and efficient use of such brakes. This involves also the further duty devolving upon the dock company to use cars and to have men to be upon the lookout for the safety of one in the employment and position that the deceased then was, and to apply the brakes so as to save him from harm.

One member of this court is of the opinion that in the case of the dock company, engaged in the operation of its empty cars at this point, while placing them upon the sidings, the general rules of law, as to the duties of employers toward employes, lay no such duty upon it; that so far as any one in their employment in the situation the deceased was in is concerned, having no duty to perform upon the car or upon the track, it might have run this empty car upon the side-track without either brakes or brakeman thereon. Also, that the keeping of perfect brakes upon these cars, or having the cars in good order so far as the brakes are concerned, before they were turned over to the dock company, was a precaution not required of the receivers in the exercise of ordinary care and prudence as a duty to deceased, since one employed as the deceased was in carrying a bucket of oil across the tracks might reasonably be expected to look out for himself and get out of the way and keep off of the tracks as the cars were passing, and his failure to do so was not to be anticipated or apprehended or provided against, but this may be so far a mixed question of law and fact as that perhaps under proper instructions it should go to the jury.

We come now to the consideration of the question of contributory negligence involved in this case. I have already said that deceased knew the situation and the dangers thereof. He knew the degree of darkness prevailing upon this particular night;

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he knew that there was a noise being made by the emptying of the car which was upon the tipple just at the time this empty car came upon him, a noise that would prevent him from hearing the running of the empty car down this grade toward him; he knew there was no light used upon these empty cars for a warning to those crossing backward and forward over those tracks. He was not required to work upon the tracks. Though his duty in going after this oil in pursuance of the order of his superior required him to cross the tracks in the performance thereof, he was not required to go upon the tracks until he had taken proper precautions for his safety; there was no hurry about it; he could pause and look and listen; he could take care and use his judgment; he could make sure of his safety; he could wait until the noise of the tipple had ceased; he was not required to exercise any great degree of speed in getting back with the oil he had been sent after; it was his duty to look after his own safety; he could have passed over this track in a distance of about eight feet and been out of harm's way by a few quick steps, but instead he walked on the track, though, as is said in the evidence, he walked *obliquely* upon the track; he walked along the track some little distance, though he may have been making his way from the west side of the track to the east side of the track all the time. The testimony is that his back was towards the approaching car, toward the north, his face toward the south, and he must have walked upon this track, though obliquely, some little distance; for the testimony of the witness, Mindus, is to the effect that the deceased, when he saw him upon the track, and when he, Mindus, applied the brake, was some sixty or seventy feet away from him; that the car at that time was proceeding toward deceased at the rate of about eight miles an hour; and that he applied the brake as well as he could. The car appears to have been stopped within a distance of from eighty to one hundred and twenty feet. He retarded the speed of the car, no doubt about that. From all the evidence it appears to us that the average speed of the car from the time the brake was applied until it overtook the deceased could not have been over three or four miles an hour; deceased must have walked at least half as fast as that. He

was, as I have said, upon the track when he was first observed by Mindus, so that he must have walked a distance of from twenty to forty feet upon the track before the car overtook him. That was quite unnecessary under the circumstances, and it was, in our view, extremely negligent upon his part. It does not appear that during his progress upon the track he at any time turned his face toward the northward to see if he could observe the approach of a car. If that were true, then it was exceedingly negligent for him to walk upon a track where a car was likely to come upon him and where he could not observe its progress toward him.

It is conceded that ordinarily and also upon this evening, the cars went by this shanty upon these tracks at the rate of one every three to six minutes; that they were going rapidly; that when a car was being emptied upon the tipple that was evidence to persons familiar with the operations there in the yard, therefore evident to the deceased, that an empty car was making its way from the tipple down upon one or the other of these four side-tracks. He had often ridden these cars himself. He knew exactly how that was done.

Under all of these circumstances, it seems to us entirely clear that deceased was guilty of negligence, contributing directly to his injury and death. The rule that contributory negligence defeats recovery may be a harsh rule; it may seem in some cases unjust and not humane, but it is a rule of law in force in this state, and we are bound to observe it and enforce it; and, while it may be open to this criticism in some cases, on the other hand a great deal may be and has been said in its favor and support; but it is sufficient for us to say that it is the law. *Wabash Ry. Co. v. Skiles*, 64 Ohio St., 458, and *Pennsylvania Co. v. Mahoney*, 22 C. C., 469, are in point upon this state of facts appearing in this case.

It is said that the failure of deceased to take care and look out for the car may be excused because of the custom that had grown up in the yard of giving warning, not of the approach of cars generally, but of giving warning when a defective car, or a car with a defective brake was started from the tipple on its course northward, and thence to the southward upon these side-

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tracks. In our opinion that was not sufficient to excuse the apparent negligence in this case. It does not appear clearly that there was any rule or any custom to give warning of that kind for the benefit of a person who might happen to be crossing the track in this vicinity, but rather that the warning was for those upon whom devolved the duty of being upon the track in the vicinity of the tipple to operate certain machinery there and those who were receiving the cars and putting them upon the side-tracks; to those this warning was habitually given. It is said that no warning was given upon that occasion. But even if it had been a custom which had grown up there to give a warning or cry of this sort for the benefit of all who might be in and about the yards, doing all sorts of work, yet at the time this accident happened it appears that there was such a noise on account of the emptying of the car at the tipple that such a warning could not have been heard by the deceased; that as a matter of fact, Mindus, when he saw the deceased, when within from sixty to seventy feet of the car upon the track, gave all the warning of which he was capable by the use of his lungs and his voice, by screaming out to the deceased to apprise him of the fact that a car was approaching. In our judgment the verdict of the jury to the effect that deceased was not guilty of contributory negligence in this case is against the weight of the evidence.

There are some alleged errors in the charge to the jury. But I have taken so much time in the decision of this case that I will not stop now to refer to them at length, as the case must go back for retrial as to one defendant only, and the same charges are not likely to be repeated. And we think that in view of the special verdict no harm was done by the errors complained of in the charge. The chief complaint is that the court charged in effect that if either defendant was guilty of negligence in any respect charged, both might be responsible therefor. Parts of the charge are open to that construction and in that respect the charge was erroneous, but, as before indicated, the special findings enabled the court to avert any harm that might have resulted from such error.

It will be observed that here in a suit against two defendants on an alleged joint cause of action, that is, for alleged negligence of which they were jointly guilty, and on account of which they would therefore be jointly, as well as severally, liable, a joint general verdict and joint judgment are predicated upon a finding that the receivers were guilty of negligence in one respect, and the dock company was guilty of negligence in another respect, and neither act of negligence found was in any way concurrent with, dependent upon or resulted from, or was connected (as cause and effect) with the other, *i. e.*, there was no causal connection of the two acts of negligence found by the jury. *Pennsylvania Ry. Co. v. Snyder*, 55 Ohio St., 342, and *Pennsylvania Ry. Co. v. Meyers*, 12 C. C., 263, affords no authority upon this state of affairs. See Pomeroy Code Remedies, Section 308; *Missouri, K. & T. Ry. Co. v. Merrill*, 60 Pac. Rep., 819. But the conclusion we have reached makes it unnecessary to consider what the court might be required to do in dealing with that state of affairs, if the course taken and result arrived at in the court below were in all other respects unobjectionable.

We have given our attention to the case of *Gas & Gasoline Engine Co. v. Schelies*, 61 Ohio St., 298, upon the claim of the defendant in error, Swart, that the negligence of deceased was excusable or not fatal to recovery, because he was ordered into the place of peril. But in our opinion that case is not at all applicable to the situation which we have before us in the case at bar, for here deceased might have easily avoided the peril while obeying the order. It is a very unfortunate accident. It appears that a good man, a very useful man to his family, was suddenly taken away. But we can not find that there was any culpable negligence upon the part of the dock company, and we are of the opinion upon the evidence as it stands in the record that the verdict is not sustained as to the receivers of the railroad company, and it is reversed because it is against the weight of the evidence upon the question of contributory negligence.

As to the dock company, the case will be dismissed, because it does not appear that there was any negligence found, or that any negligence could be found that would have made the dock

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company liable in this case, since nothing is charged against it that does not come within the doctrine of assumed risks upon the part of the deceased.

Defendant in error, Swart, excepted. The Huron Dock Company and receivers of the railroad company excepted to the overruling of the motion for leave to apply to the court below for a correction of the bill of exceptions.

C. P. & L. W. Wickham, for plaintiff in error and receivers of railway company.

C. A. Thatcher and W. B. Starbird, for Swart, administratrix.

RAILWAY TICKETS GOOD FOR CONTINUOUS PASSAGE.

[Circuit Court of Crawford County.]

HENRY ELLSWORTH V. THE PENNSYLVANIA COMPANY.

Decided, February 5, 1904.

Contract—As Embodied in a Railway Ticket—Good for a Continuous Passage—But the Train Stopped Midway in the Journey, and the Passenger Was Ejected from a Train—Failure of Defendant's Servants to Give Instructions to Passenger.

Where a railway passenger, holding a ticket "good for continuous passage to destination," is interrupted in his journey by the train reaching the end of its run, and no information is given him either by the agent who sold him the ticket or the conductor with whom he has been traveling, as to when or upon what train he can continue his journey, and he ignorantly allows one train to pass and resumes his journey on the second train, the conductor of which refuses to accept his ticket and ejects him therefrom, there are facts presented which should be given to the jury under proper instructions as to the contract and the law.

NORRIS, J.; DAY, J., concurs; MOONEY, J., dissents.

Error to the common pleas.

On the 28th of March, 1899, Henry Ellsworth, plaintiff in error and plaintiff below, bought a ticket of the defendant, The Pennsylvania Company, at its railway ticket office at Wooster, Ohio. The ticket recites that it is, "Good for continuous pass-

age to destination commencing only on date stamped on back hereof, or on the day following * * * no stop-over will be allowed on this ticket. * * * Agent must plainly stamp the date of issue on the back hereof."

There are other recitals in the ticket which do not pertain to this controversy. The agent did stamp on the back of the ticket its date which is the 28th of March, 1899. Provided with this ticket the plaintiff boarded the defendant's train at Wooster, presented said ticket to the conductor who accepted it for that ride and returned the ticket to the plaintiff, and on that train he journeyed toward Bucyrus as far as Crestline. Crestline was the end of that run. The train proceeded no farther than Crestline where it arrived at 8 P. M., or thereabouts. At Crestline the plaintiff left the train and there remained until the following morning the 29th of March, at 7:05, when he boarded one of defendant's trains which ran from Crestline to Bucyrus, each of which points were stations on the same line at which the train regularly stopped. Upon this latter train he was carried toward Bucyrus as far as the station of North Robison, where the conductor, having refused to accept said ticket for passage on that train from Crestline to Bucyrus, ejected him from the car and train, for the sole reason that the plaintiff insisted on pursuing his journey to Bucyrus, by virtue of said ticket, and the contract expressed by its terms. Such are in substance the allegations of plaintiff's petition supplemented by the declaration that defendant's servants, in removing him from the train, committed upon his person an assault and battery. Because of all this, plaintiff seeks recovery.

The answer is a general denial.

These issues came on for trial in the common pleas to a jury, the trial proceeded, and after plaintiff had submitted all his evidence, the court upon motion of the defendant in that behalf, arrested and withdrew the testimony, discharged the jury from further consideration of the case, and gave and entered judgment for defendant. This, on ground that the evidence of plaintiff showed no right of action against defendant. The motion of plaintiff for new trial was overruled. To reverse this

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judgment and proceeding of the trial court, this cause in error is instituted, plaintiff claiming that the court erred—

1. In sustaining said motion and withdrawing the evidence and entering judgment for defendant.

2. That from the evidence the plaintiff was entitled to the verdict of the jury.

3. And that the court erred in not submitting the case to the jury upon the evidence and proper instructions as to the law.

It is necessary even at the risk of repeating to state fully the facts disclosed by this record. The evidence of the plaintiff shows that about 6 P. M. on March 28, 1899, he purchased his ticket from Wooster to Bucyrus, of defendant's ticket agent at Wooster. Wooster, Crestline and Bucyrus are stations on the same line of defendant's railroad. The next train passing through Wooster running in the direction of Bucyrus, was the train that he boarded which went no farther than Crestline. Of this fact he was acquainted when he was purchasing the ticket, and fully understood that the train was one of defendant's regular passenger trains, scheduled not to go to Bucyrus, but that Crestline was the end of its run. He had knowledge of the fact that plaintiff had no train running from Crestline to Bucyrus and halting there, which departed from Crestline immediately after or shortly after the arrival of this train at that point. Plaintiff asked the agent before he purchased the ticket if the ticket would be honored on this train, and the agent sold him the ticket without hesitation through to Bucyrus, with the knowledge that it was plaintiff's purpose to use it as far as Crestline, on this train which ran to Crestline and stopped there. The agent gave him no instruction as to what train he should take on his arrival at Crestline, which would make compliance with the conditions of the ticket; and gave him no information as to what time a passenger train would depart for Bucyrus next after his arrival at Crestline. Being on board the train he presented the ticket to the conductor who examined it and punched it, and with this indorsement of it, as a right to proceed from Wooster to Bucyrus, returned the ticket to him.

This conductor who knew that his train went no farther than Crestline, and who knew when the next train would depart from

Cresline to Bucyrus, and who knew that plaintiff must leave this train at Crestline, and must take another train at Crestline for Bucyrus; and that plaintiff had bought the right to ride to Bucyrus on this ticket; and who knew the terms of the ticket, and who is presumed to have known and whose duty it was to know, the requirements of defendant under it, and the construction which defendant put upon the contract, under just the circumstances which then confronted plaintiff; gave plaintiff no instruction as to how he should proceed after his arrival at Crestline to meet the requirements of the contract; and no information as to when the next train would leave Crestline for Bucyrus. The plaintiff did not know that a train departed from Crestline for Bucyrus at 11:55 P. M., which was the fact, but was of the opinion that the next train after his arrival left Crestline for Bucyrus at about 7:05 in the morning. And this train he entered as a passenger for Bucyrus on the morning of March 29th, and from it he was ejected at North Robison in such manner as would seem amounted to an assault and battery. And these were the facts that were taken from the jury and upon which the judgment for defendant was rested, the court holding that under the law, measuring these facts by the contract, the plaintiff should not be permitted to recover.

We will treat the controversy as if the charge of assault and battery were not in the record.

This ticket is a contract made by the defendant with the plaintiff to carry the plaintiff from Wooster to Bucyrus by one continuous passage, commencing on March 28th or 29th, at plaintiff's option, at any time within that period after the hour the ticket was purchased. It is not questioned by defendant that the passage commenced, and properly, on the train that plaintiff boarded at Wooster, and so continued as a journey commenced under the terms of the ticket, to Crestline. And that so far the acts of the parties were strictly in compliance with the contract.

It is urged by the defendant that by not continuing his journey to Bucyrus, by the next train departing for Bucyrus—the train which left Crestline at about 11:55 P. M. of the 28th, the plaintiff took from the defendant the opportunity of complying

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with its contract, and voluntarily released defendant from further obligation to perform it, which, under the rule to be found in *Hatton v. The Railroad Company*, 39 O. S., 375, and elsewhere, excuses liability.

The stipulation that a passenger shall make under the contract his journey by a continuous passage, is not an unreasonable requirement. And, indeed without specific terms expressed in it, a railroad ticket is held to be an agreement between the carrier and the passenger for a continuous passage between the starting point and destination named in the ticket. So that the pivot of this case is the determination of whether or not under the circumstances evidenced by this record, the progress of this plaintiff as attempted by him, was in fact a continuous passage from Wooster to Bucyrus, as contemplated by the contract, and as embraced in that term, and as construed and interpreted on that occasion by both the plaintiff and defendant.

I have not been able to find a single case that can be said to throw light directly into the face of the case at bar. The cases are very numerous, holding and properly holding, that where a railroad ticket provides for a continuous passage, the holder is not entitled as a matter of right to a stop-over at some intermediate point. And if the passenger voluntarily leaves the train and breaks the journey without the assent of the carrier—after the intermission which he has thus without the consent of the carrier created by discontinuing his journey, he can not again resume it under the same contract. But the continuity of the passage must be broken by the holder of the ticket, and this, without the assent or fault of the carrier. For this doctrine we do not have to look beyond our own Supreme Court, and find it broadly laid down in the case in 39 O. S., 375, to which I have referred.

But each of the cases—and many of them, are to be found cited in 56 L. R. A., at page 769, *et seq.*—stands on its own facts; the doctrine applies no farther than the facts. And in each case it will be found that the holder of the ticket broke the journey, while the carrier was in the performance of the contract upon its part, and was demanding of the carrier without its consent, a piecemeal performance of the contract, which the carrier had at no time modified or violated. And in every instance

the break in the journey had been made in intent and in fact and for a purpose on the part of the ticket holder, which makes it without doubt manifest that each demand to proceed to the destination named in the ticket, was not concerning the journey commenced under the ticket, but was concerning a distinct and separate journey. In some instances the passenger left the train and went back to other stations on the same line; or proceeded to other towns not on the line; or left the train for the purpose of transacting business at the place where the journey was broken. But in every instance the intent of the ticket holder was not to proceed then to the destination named in the ticket, but to break the journey then and there, because of that which he deemed required the abandonment of that continuous passage.

The acts of corporations are followed by legal implication as are the acts of individuals. This contract with the defendant by this ticket, is subject to the same rules of construction and governed by them that are applicable to other contracts between individuals. And the parties to it are required to go no farther in discharge of it, than substantial compliance with its terms.

The general rule appears to be, that if a continuous passage necessitates a change of trains, it must be continued on the next available train (*The L. & N. R. R. Co. v. Klyman* [Tenn.], 56 L. R. A., 769). Yet this rule is held to yield to an agreement to the contrary, or that which infers consent or amounts to consent that the contract be modified in that behalf.

It is conceded that plaintiff commenced his journey from Wooster to Bucyrus properly under the contract. But defendant claims that by the terms of the ticket, plaintiff was under obligation to take the next available train departing from Crestline to Bucyrus, after his arrival at Crestline, which was at 11:55 P. M.

Having commenced his journey on a proper train, and a delay and a change of trains at Crestline being necessary, in order that defendant have opportunity to carry plaintiff to Bucyrus, and thus comply with its contract, it became the duty of defendant to instruct plaintiff how and when it intended to comply with its agreement and what was required of him in that behalf.

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While this is not an action to recover because of negligence, and negligence as a ground of recovery has no place in the case, yet that no instruction was given by defendant becomes pertinent when connected with the facts appearing in the record, that plaintiff did not know that the first train, after his arrival at Crestline, departed for Bucyrus at 11:55 P. M.; that he did not intentionally break the continuity of the passage. And because defendant, by failing to give him that information, might be deemed to have assented to such modification of the contract as would allow him to proceed on a train that to his knowledge was the first available train for that purpose—while this might not necessarily go to the extent of substantive and express interpretation of the contract by the defendant, it may be deemed to be a consent on defendant's part, that plaintiff himself interpret the contract and modify its literal terms, by doing that which seemed under the circumstances required of him, in order to give defendant an opportunity to comply with the terms of the ticket, by that which was then in his view, an ordinary, usual and direct method of compliance.

The ticket did not inform him what to do next. No person informed him. And the circumstances and the acts and omissions of defendant did tell him that defendant did not, as to that contract, and as defendant at that time considered it, intend that the words "continuous passage" meant an uninterrupted transit from Wooster to Bucyrus.

It is true that the evidence does not show express modification of the contract by competent authority. But it would not seem that absence of evidence in such behalf, is of import in this controversy.

In discharging duties which defendant in good faith owed to plaintiff, or in neglecting to observe them, the agent at Wooster, and the conductor of the train which plaintiff boarded at Wooster, were acting for the defendant.

If neglect to perform a duty which defendant owed plaintiff under the circumstances effected a modification of the contract, and was then in effect a consent, and that from which plaintiff might well infer consent, then the result of failure of defendant's servants performs the same office as would consent or

modification by defendant itself. If their acts or omission to act, being the acts of defendant, led plaintiff to depart from the strict letter of the contract, he had the right to get back to the contract in his way, if his way was a reasonable way.

Now, were the acts of defendant such as to indicate to plaintiff, as a man of ordinary judgment and prudence, and one desiring to substantially comply with the terms of his contract with defendant, that he might continue his journey, under the contract, on the 7:05 morning train to Bucyrus. The ticket was sold to him at Wooster under such circumstances as well led him to believe that he could select that train at Wooster, as the one upon which to commence his trip. The conductor of that train received the ticket, punched it, and thus giving it his indorsement, returned it to plaintiff. No instructions were given plaintiff as to how and when defendant intended to further comply with the contract, or what was required of plaintiff, that he might give defendant opportunity to make performance of it. Of all of which he could have been informed without additional trouble or expense to defendant, and which the relations of the parties and the circumstances of the case required the defendant in good faith to do.

There is present in the record no evidence of intention on plaintiff's part to break the journey or abandon it. His sole object was to continue it. He transacted no business; did no act; entertained no purpose that would interfere with his continuous passage to Bucyrus; and was not aware that he was not in strict compliance with the agreement when he entered the train at Crestline for Bucyrus, or that another train in the meantime had passed which would have been available to him. His first delay had not arisen by any violation of the contract on his part. His failure to take the 11:55 train was not intentional, nor with knowledge that he could do so. And his ignorance of that fact was not assisted by the defendant, whose duty it was under the circumstances to inform him.

He did nothing which indicated the remotest intention to break the continuity of his trip. He presented to the conductor the evidence that he had paid his fare from Wooster to Bucyrus,

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and all this within the time in which he might have commenced the journey between the points which defendant had contracted to carry him. And he was ejected from the train for the sole reason that he insisted that defendant comply with the terms of the ticket, as he under the circumstances understood them.

This ticket notified the conductor, who ejected plaintiff, that a contract had been entered into between plaintiff and defendant, and that performance of its conditions had commenced. This being true when he, the conductor, undertook to determine the rights of the plaintiff under the contract, he must not make a wrong decision. He could not, without further information, apply the rule laid down in the Shelton case in 29 O. S., 315, unless to do so was no mistake. It was not as if the ticket had been wrongfully taken up, as in that case, by another conductor, and plaintiff had demanded to be carried to Bucyrus without any ticket at all. And hence application of the naked rule, that a passenger without a ticket who refused to pay his fare, must submit to ejection from the train, was as to this plaintiff, under the circumstances, application of it at defendant's peril.

We think the facts measured by the contract and the law, should have gone to the jury, and that in arresting the evidence and in entering judgment for defendant the common pleas was in error.

The judgment is therefore reversed.

J. W. Coulter and *T. E. Powell*, for plaintiff in error.

S. S. Wheeler, for defendant in error.

STATUTE OF LIMITATIONS—MORTGAGE.

[Circuit Court of Monroe County.]

THOMAS BAIRD V. ISAAC W. RAMSEY ET AL.

Decided, November Term, 1903.

Title—Protected by Statute of Limitation—Against a Mortgage—Securing a Note More Than Twenty-one Years Due—Partial Payment Made Sixteen Years Before Action Was Brought.

In an action to quiet title to real estate against a mortgage upon the same, given to secure a promissory note which matured more than twenty-one years before the beginning of the action, and upon which note a partial payment had been made and endorsed thereon more than sixteen years previous to the commencement of the action. *Held:* The plaintiff was entitled to a decree quieting his title against such mortgage.

COOK, J.; LAUBIE, J., and BURBOWS, J., concur.

Appeal from common pleas court.

August 30, 1901, plaintiff filed a petition in the common pleas court to quiet his title to certain real estate which he claimed to own and be in the possession of, situated in this county. He set forth in his petition that the defendants claimed to hold a certain mortgage upon such real estate which was of record in the recorder's office of the county uncanceled; that the same was invalid, and was a cloud upon his title.

The defendants answered, setting up that on the 27th day of December, 1877, the plaintiff, his wife joining with him, duly executed and delivered to one Aaron F. Ramsey the mortgage referred to in the petition of plaintiff to secure a promissory note given by plaintiff for the sum of \$2,216.13, payable December 24, 1878; that on July 29, 1884, the plaintiff made a payment upon said promissory note of \$103.87, which was indorsed by said Aaron F. Ramsey upon said note of that date in the presence of plaintiff and at his request; that on the 17th of January, 1889, Aaron F. Ramsey duly assigned and transferred the note and mortgage for value to Isaac Aaron Ramsey, Aaron Nolan and Aaron Ramsey Sharron, his grand-children, who, with their guardian, are the parties defendant to this

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action; and that by reason thereof they not only have a valid interest in the property, but are legally entitled to the possession thereof.

To this answer the plaintiff makes reply, denying that said payment was made; also denying the transfer of the note and mortgage, and further insisting that if such payment and transfer were made, yet the mortgage was invalid and has no legal force and effect, as from the averments of the answer it is barred by the statute of limitations.

We find as a fact from the evidence that the payment and transfer were made as averred in the answer, and that brings us directly to the question as to whether or not the claim of defendants in or to the property under the mortgage is barred by the statute of limitations.

It will be observed that the payment was made more than fifteen years, but less than twenty-one, previous to bringing this action by plaintiff to quiet title; and further that the note to secure which the mortgage was given matured more than twenty-one years before the bringing of the action. It is conceded, as it must be, that suit could not have been successfully maintained by defendants to foreclose the mortgage, as more than fifteen years had elapsed from the maturity of the note and also from the making of the payment. *Kerr et al v. Lydecker*; *Adm'r*, 51 O. S., 240.

It is insisted, however, that as less than twenty-one years had elapsed from the making of the payment the defendants could maintain an action of ejectment, and therefore their answer is a valid defense.

That the mortgagee or his assignee might maintain an action of ejectment against the mortgagor after condition broken there is no question.

In the case referred to, *Kerr et al v. Lydecker*, *Adm'r. supra*. on page 250 in the opinion it is said:

"After condition broken, the title is vested in the mortgagee, as between him and the mortgagor, and as the right of the mortgagee to recover the possession of the land by ejectment always existed at common law, and has not been taken away by statute, it still exists in this state." *Heighway v. Pendleton*,

15 Ohio, 735; *Allen v. Everly*, 24 O. S., 97; *Hibbs v. Insurance Company*, 40 O. S., 543-559; *Rife v. Lybarger*, 49 O. S., 427.

On page 251 it is said:

"A strict foreclosure was therefore in no sense a recovery of either title or possession, because he had the title vested in him, and the strict foreclosure did not give him possession.

The same is true of a foreclosure and sale under the code. The right to redeem is cut off by the foreclosure, but no title is thereby recovered by the mortgagee, because the title, as between him and the mortgagor, is already in the mortgagee."

In *Heighway v. Pendleton*, 15 O., 736, the leading case referred to is *Kerr et al v. Lydecker, Adm'r, supra*; it is decided:

"When the condition of the mortgage is broken as between the parties, the title to the mortgaged premises vests in the mortgagee and remains in him until satisfaction."

From these authorities it would seem that the law is conclusively settled in this state, that after condition broken, in this case from the maturity of the note, the title to the mortgaged premises as between the parties is vested in the mortgagee, and that at that time and any time afterwards, the mortgagee might bring ejectment against the mortgagor to recover the premises.

It follows therefore, necessarily, that the title to the premises having vested absolutely in the mortgagee on the 24th of December, 1878, that action must have been commenced within twenty-one years from that date to recover the possession of the mortgaged premises or he could not do so against the objection of the mortgagee, unless the payment made July 29, 1884, took the case out of the statute. *Bradfield et al v. Hale et al*, 67 O. S., 316.

We do not think the payment could in any way effect the title. It might renew the note, so that foreclosure proceedings in equity might be prosecuted, for the period of fifteen years. On that question we express no opinion, but more than fifteen years had elapsed from the payment to the commencement of the action.

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How could the partial payment affect the title? Section 4992 provides:

“When any payment has been made upon any demand founded on contract * * * an action may be brought thereon within the time herein limited after such payment.”

The mortgage was in no sense a contract for the payment of money. It was not a demand founded on contract, but a security for the payment of the note; a deed with a defeasance which became absolute upon the non-payment of the note. The title to the property vested immediately upon failure to pay the note, and the mortgagor could only regain the title by its full satisfaction. If by partial payment the title again becomes vested in the mortgagor how long does it so continue; after payment does it go back again to the mortgagee; if so, upon every payment the title changes twice, which leads to an absurdity. We do not think that Section 4992 has any relation to the vesting or divesting of the legal title to the premises described in the mortgage.

No question has been made as to the effect of the transfer of the note and mortgage to the defendant, and we can not see that it has any effect upon the title of the premises whatever; they have the same legal rights as the original mortgagee, and are affected with the same legal liabilities.

The plaintiff is entitled to have his title quieted in the premises. Decree accordingly.

Moore & Jeffries, for plaintiff.

Spriggs & Son, for defendant.

SUBSCRIPTION FOR ROAD IMPROVEMENT.

[Circuit Court of Lucas County.]

PHILIP HASSENZAHN ET AL V. WILLIAM BEVINS.

Decided, April, 1902.

Road—Built Under the Two Mile Assessment Act—Subscription by One Whose Lands are Benefited—But are Beyond the Jurisdiction of the Commissioners—Do Not Lack Mutuality After the Work is Done—And Can Be Enforced.

1. The necessity and utility of a road improvement depend in a measure upon its cost, and if the county commissioners can reduce the cost by accepting subscriptions from property owners beyond their jurisdiction, whose lands will be benefited by the improvement, they are justified in taking such subscriptions into consideration in deciding the question of utility.
2. The promise of such a subscriber to pay does not lack mutuality after the commissioners have made the improvement.
3. When, therefore, a road built under the two-mile assessment law is carried to the state line in consideration of property owners over the line whose property is benefited, subscribing a specified amount toward the cost of the improvement, such subscriptions are collectable at law, in a suit by the commissioners after the work has been completed.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This is a proceeding in error from the court of common pleas of this county. In the court below a general demurrer to an amended petition was sustained, and the plaintiffs not desiring to plead further, judgment was entered dismissing the same. To that judgment they prosecute error here. The plaintiffs below and in this court are the county commissioners of Lucas county.

The suit is upon an alleged undertaking by the defendant, William Bevins, to contribute toward the expenses of constructing a certain macadamized road, or the macadamizing or improving of a certain road under the two mile assessment law (Sections 4831, Revised Statutes, *et seq.*) It appears from the averments of the petition that in the improvement of a certain public

road called Lewis avenue, extending from the city limits at a certain point to the state line between the states of Ohio and Michigan, a distance of perhaps two miles and a half from West Toledo, northeasterly to the state line between the state of Ohio and Michigan, was petitioned for under this statute; that the viewers, who were required under the statute to report whether in their opinion the improvement was a necessity, reported to the commissioners that it was not enough of a necessity to justify extending it to the Michigan line at the expense of landowners in Ohio or in Lucas county; but that if the owners of lands in Michigan whose lands would be especially benefited by the improvement would contribute \$1,500 toward the expense, then the improvement might be deemed of sufficient necessity to justify the expense falling upon the property owners in this county. Now the commissioners are required to say whether or not the road petitioned for is of public utility, or whether public utility requires the improvement, and the commissioners were unwilling to find that public utility required the improvement at the sole expense of property owners in Lucas county. Perhaps they were not authorized to so find, except upon a report by the viewers in favor of the road, finding that it was a necessity.

At all events, in pursuance of this recommendation of the viewers, the commissioners and all persons interested in the improvement got together and it was arranged and agreed between them that if the property owners in Michigan would pay \$1,500 toward the improvement, it would be carried forward; otherwise, it would not. It was perhaps contemplated that it would be carried forward to within about half a mile of the Michigan line in the event the Michigan parties did not contribute. Certain persons interested agreed that they would procure contributions from Michigan property owners, whose property was especially benefited, to the amount of \$1,500, and that they themselves would be bound for this \$1,500, and it appears that thereupon they took agreements or promises to pay from the parties in Michigan, one of whom was Mr. Bevins, who owned a piece of land close to the state line and cornering upon this proposed improvement, to pay certain amounts towards the cost and expense on this improvement, the promise of Mr. Bevins being to

pay \$100. When these promised contributions amounted to \$1,500, the viewers reported that they found that the improvement was a necessity, and the commissioners then found that public utility required the improvement, and they proceeded to follow the directions of the statute and to make the improvement.

Now this suit is against Mr. Bevins upon his promise to pay \$100 toward this improvement. His promise was not made directly to the commissioners; but it is conceded on all hands that the arrangement amounted practically to an agreement that Bevins should pay the commissioners of Lucas county \$100 toward this improvement. The amended petition so sets it up and it will be so considered.

Counsel for defendant in error urges, and his contention was sustained by the court of common pleas, that this agreement can not be enforced for several reasons: (1) He says it is without consideration; (2) That it lacks mutuality, that is to say, it was not enforceable against the commissioners, therefore, it can not be enforced against him, which is only another phase or branch of the question of consideration; and, (3) He urges with great earnestness as his chief ground of defense that the commissioners being unauthorized, either expressly or by necessary implication, to enter into a contract of this kind, and it being against public policy, that, therefore, it can not be enforced.

We find no express authority in the statute for the commissioners to enter into a contract or arrangement of this character. Neither do we find that it is given by clear implication of law, that is to say, that it is such an act as may be necessary to carry out the powers expressly conferred upon the commissioners or to enable the commissioners to perform the duties expressly enjoined upon them.

But if it be conceded that the commissioners had none of these powers, still we think it does not follow that the board can not enforce this contract. We think that there are other principles that have application and influence in a case where a contract has been fully performed upon the one side and the party resisting performance upon his part has received and is enjoying the fruits of the performance of the other party.

Before going to that I will say briefly that it is not apparent to us that this contract is without consideration. It seems to us very clear that it is supported by a good and valuable consideration; that is to say, relying upon the averments of the amended petition, which sets forth that these lands owned by the defendant were outside of the jurisdictional limits of the commissioners and could not be reached or affected by any assessment that they might make, but that they were lying contiguous to this improvement; that the improvement was a special benefit to these lands; and it was on that account the defendant made his promise to contribute toward the cost of the improvement. We think that that states a valuable consideration.

As to the contention that there is a want of mutuality, because the contract, while executory, could not be found against the commissioners because they could not be compelled by Mr. Bevins or others in Michigan to build the road, we are of the opinion that that defense or objection can not be interposed by Mr. Bevins, after performance by the commissioners. I will read a paragraph on this subject from Parsons on Contracts (6th Ed.), page 447:

“A promise is a good consideration for a promise. And it is so previous to performance and without performance. As if one promises to become a partner in a firm, and another promises to receive him into the firm, both of these promises are binding, each being a sufficient consideration for the other. So a promise by a seller to refund in case of deficiency in the thing sold is a good consideration for a promise to pay for any excess therein. If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but, without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction is void. The reason of this is, that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.

“This has been doubted, from the seeming want of mutuality in many cases of contract. As where one promises to see another paid, if he will sell goods to a third person; or promises to give up a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand, or suspend

legal proceedings or the like. Here it is said that the party making the promise is bound, while the other party is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee within a reasonable time engages to do, or else begins to do, the thing which is the condition of the first promise.

"Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and, therefore, no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise with entire mutuality of obligation. So, if the promisee begins to do the thing, in a way which binds him to complete it, here is also a mutuality of obligation. But if without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him."

Applying these principles, we think it can not be said the contract lacks mutuality, in the sense that the term mutuality is used here, after there has been full performance upon the one side.

It is suggested that the commissioners are not only without authority to sue upon this undertaking, but that there is no direction in the statute as to the use or disposition that shall or may be made of the funds, after they are recovered, if there should be a recovery, and that, for this reason, there arises an objection to the commissioners going forward with the suit; the inference being, we take it, that if they recover, there being no other place to put the money, they might put it in their own pockets. But Section 845, Revised Statutes, provides that:

"The board of commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and of bringing, maintaining and defending all suits *
* and the money so recovered in any case shall be by them paid into the treasury of the county, and they shall take the treasurer's receipt therefor and file the same with the auditor of the county."

Now we come to the consideration of the question which has been most argued by counsel, and to which the most attention has been given in their respective briefs; and that is, whether, admitting that the commissioners are without express authority to enter into this contract; admitting that they may not have sufficient authority, express or implied, so that they could enforce the contract, if entirely executory, and that it can not be enforced against them, the promise of the persons who agreed to contribute to this improvement may be enforced, since the commissioners have performed and since the parties promising enjoy the benefits which they sought, and on account of which they made the promise.

We can not find that there is anything immoral in the promise on the part of the commissioners to carry forward this improvement, if certain contributions are made by others than those who can be required to contribute. Neither can we find that entering into an arrangement of this character is expressly prohibited; and these facts should be born in mind in considering the authorities bearing upon the right of public officers to enforce contracts that they are not in the first instance authorized to enter into. There are certain contracts, which are expressly prohibited, or which are immoral, and clearly against public policy, that are therefore absolutely void. This we do not think was a contract of that character.

It is said that if this improvement was a public necessity, the viewers were bound to say so, and if it was not a public necessity, they were bound to say so, and the question of whether or not it was a public necessity was not to be determined, or their decision upon that question was not to be influenced, by promises of the parties who could not be compelled to contribute toward the cost of the improvement.

But we think that there is some discretion vested in the viewers who are called upon to say whether this will be a public necessity, and that some discretion is vested in the commissioners to say whether or not it will be of public utility, that these terms are somewhat flexible, and are not to be regarded with the strictness contended for by counsel for defendant in error. The public necessity or public utility may depend somewhat upon

the cost of the thing, and the real question is whether the improvement is of sufficient use and benefit to the parties who will be called upon to pay for it to justify its being constructed; whether it is of sufficient public necessity and public utility to justify laying the cost of it upon the property within two miles of the improvement; and if this cost or expense can be reduced by other contributions, we think that is a fair and proper matter for the commissioners to take into consideration in passing upon the question of the public utility; and that these contributions are not such as may be said to influence the officers improperly in the discharge of their official duty. We think it is a proper influence, and proper to be considered by the commissioners.

There is one case in point, and but one, so far as we can find, in support of the contention of counsel for defendant in error, and that he has cited, to-wit, the case of *Commissioners v. Jones, Breese* (Ill.), 237. The gist of it is given in the syllabus:

“An agreement to pay the County Commissioners of Randolph County a certain sum of money provided they will build a court house on a particular lot, is not binding for want of mutuality, although they do build the court house on the lot designated, the obligation to pay and to build not being reciprocal.

“A promise to pay the county commissioners to do an act which they are required to do by law is against public policy, and, therefore, void.

“The county commissioners of a county have no power to contract only as a court.”

In that case the act required them to build a court house, although the act did not require them to build the court house in any particular location or upon any particular lot; the promise to pay was what induced them to build the court house upon a particular lot. Now that was held to have been lacking in mutuality, in disregard of and against public policy, and, therefore, void.

We are not satisfied with the reasoning or conclusions of the learned judge who announced the opinion, and we think it is against the weight of authority; indeed, we find numerous authorities in support of the other doctrine, and this, as I have said, is the only authority running in this way. The opinion

was by Justice Smith. The court was composed of four judges, Wilson, Brown, Lockwood and Smith. Wilson concurs in the decision; but says his opinion is founded upon a single objection "that it does not appear that the contract upon which suit is brought, was entered into by the county commissioners as a court; it is only in that character they are capable of contracting." So he does not concur in the opinion as to the contract being against public policy and lacking mutuality. It is said that Justice Lockwood gave no opinion; we presume Justice Brown concurred. It is quite an old decision, having been announced in 1827.

Counsel for plaintiff in error did not seem to get hold of the line of decisions on this question which sustain his contention; but we have discovered a number. Some of them are mentioned in 1 Dillon Municipal Corporations (4th Ed.), 458. In this section the author has this to say upon this subject:

"So, a promise to pay a public corporation, or its agents, a premium for doing their duty is illegal and void; and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. But a promise by individuals to pay a portion of the expenses of public improvements does not necessarily fall within this principle, and such promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced against them."

A number of authorities are cited, some of which I desire to refer to briefly, the first being the case of *Townsend v. Hoyle*, 20 Conn., 1. Reading from the syllabus:

"Where sundry proprietors of lots fronting on a strip of land, which have been thrown open and occupied as a highway or street in the city of N. H., to a small part of which G claimed a subsisting and exclusive title signed a writing addressed to the city authorities, requesting them to lay out such street according to law, and assess the damages, which the applicants thereby agreed to pay to the city treasurer; and this request having been complied with, A, describing himself as city treasurer, brought an action, founded on the writing, to recover such damages, it was held that, as the promise was neither made with A nor on his account the action was not sustainable." (Not as to A.).

“Where it was urged, as a further ground of defense to such action, that the undertaking of the defendants was void, for want of consideration, and as being against the policy of the law, it was held, that as the defendant had a peculiar and local interest in the granting of their request beyond that which they had in common with other citizens, they might legally bind themselves to indemnify the city.”

Then, on page 6, Judge Ellsworth says:

“Then as to consideration. The defendants are not only benefited in common with other citizens, but obviously they had a peculiar and local interest, and well might obligate themselves to indemnify the city for assuming the burthens and responsibilities of a new public highway.

“This is all the determination the case calls for; but we must not be considered as assenting to the proposition, that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is of course illegal and void. We think the amount of a public burthen, or the cost to the public of an improvement, may properly enough enter into the question of expediency or necessity. A canal, a railroad, a bridge, a new street, a public square, or a sewer is called for. If made in one way, or in one place, it will be much better for the public, though more expensive; but individuals, especially benefited, stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration or against public policy? We think not.”

To the same effect is a case in *Springfield v. Harris*, 107 Mass., 532; another in *Stilson v. Lawrence County Commissioners*, 52 Ind., 213; another, *State v. Johnson*, 52 Ind., 197. The case at page 197 contains a very full discussion of the question, and cites a great many authorities. It will not be profitable to read these now, but we call especial attention to it as being a satisfactory case. Among others cited there is *Commissioners of Canal Fund v. Perry*, 5 Ohio, 56, 57, 58. It is there held that “undertakings by written subscription to contribute money or other property, in aid of public works, are valid contracts that may be enforced in courts of justice.” In that case there was a statute authorizing such contributions, so that the court was enabled to say and did say that the subscription they were called upon to examine did not rest alone upon the general principle

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that such contracts were enforceable and were not against public policy, but the court expressly approved of the general principle. The decision is by Judge Wright. In the first paragraph of the opinion he uses this language:

“The first question claiming our attention in this case is: Whether the subscription paper, upon which the suit is founded, affords a legal foundation for the action? It has been repeatedly decided in this state and elsewhere, that promises to pay money for the erection of school and court houses, churches and bridges would, the work being undertaken or done, sustain the action of assumpsit. A moral obligation is sufficient to support an action on an express promise.” Citing cases in Massachusetts.

These authorities we think fully sustain the position of counsel for plaintiff in error. We are not given the benefit of the opinion of the court below; there seems to have been no formal opinion, and it is apparent that the court below did not have before him these authorities to which I have just referred.

The judgment of the court below upon the demurrer will be reversed and the cause remanded to be proceeded with according to law.

INSURANCE UNDER A LLOYDS POLICY.

[Circuit Court of Cuyahoga County.]

PERRYSBURG & TOLEDO TRANSPORTATION CO. v. J. C. GILCHRIST.

Decided, March 20, 1902.

Insurance—Provisions as to Suit in a Lloyds Policy—May Be Brought Against Individual Members—Service on General Manager in New York—Charge of Court.

1. The provision of a Lloyds policy of insurance that “no action shall be brought to enforce the provisions of this policy, except against the general manager as attorney in fact and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought, as fixing his individual responsibility hereunder,” is valid and binding.
2. But notwithstanding the provision that suit must be brought against such general manager as attorney in fact, an action may be main-

tained against the individual members of the association where the association has ceased to do business, and has no assets, and the attorney in fact who issued the policy has resigned, and his place has not been filled, and no service could therefore be had upon such officer.

3. A charge to a jury as to the legality of service of summons under the code of New York is erroneous, where the words "dwelling house and residence" are used without distinguishing between a dwelling house or residence which the defendant owns and one in which he resides.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The parties here are as they were in the court below. The plaintiff is a corporation and was the owner of the steam propeller "Idler," which was insured against loss or damage by fire under policy No. 30003, issued at the office of the Niagara Fire & Marine Underwriters of Buffalo, New York; and this was an association, the policy being what is known as Lloyd's policy. It was issued on behalf of the defendant and fourteen other natural persons. It was written by Henry S. McFall; and by the terms of the policy, each of said fifteen underwriters insured said propeller against loss or damage by fire for the term of one year from August 20, 1895, at noon, to August 20, 1896, at noon. About January 12, 1896, said steam propeller was destroyed by fire. Plaintiff claims to have given proper notice and proofs of loss, but it is claimed that demand for payment was refused.

One of the provisions of the policy reads:

"No action shall be brought to enforce the provisions of this policy except against the general manager as attorney in fact, and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility hereunder."

At the time the policy was issued and the propeller "Idler" destroyed, Henry S. McFall was attorney in fact for each and all of the underwriters.

On the part of the plaintiff in error it is claimed that the clause quoted is void and of no binding effect as determining upon whom suit should be brought in case of loss, and as each individual underwriter is liable for one-fifteenth of the whole amount

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insured against, suit may be brought and maintained against each. That question was passed upon by this court in the case between these same parties upon the same policy, *Gilchrist v. Transportation Co.*, 21 C. C., 19, and we there held that this clause of the policy was not void, but binding, and we adhere to that.

It is further claimed on the part of the plaintiff in error that said Henry S. McFall resigned from his position as general manager and attorney in fact of the Niagara Fire & Marine Underwriters and the several underwriters in said association, and that his resignation was accepted in March, 1896. The fire occurred in January, and suit was brought in June, 1897. Under the terms of the policy suit should be commenced in one year after the proofs of loss had been made.

It is said that, thereafter, that is, after the resignation of McFall, the association, made up of these several underwriters, had no attorney in fact or general manager, had no assets, was out of business; that this clause is not necessarily to be complied with, but the attorney in fact and general manager, having resigned and withdrawn, there being no such officer, the party whose property is burned might bring his action against each of the several underwriters for a proportionate share of the loss.

This was also passed upon by this court in the former hearing. It was said in argument that it was not necessary to pass upon it; that what was said was not necessary to the decision of the case, but we adhere to what was said in the case before, when it was here upon this proposition. The language used is:

“Where the attorney is also an underwriter, this clause of the policy is valid and not contrary to public policy; but, notwithstanding this, if it be shown that the company had ceased its business, that it had no assets of any kind, that the attorney in fact had resigned and his place had not been filled so that service could not be had upon such attorney in fact, then we think the action could be maintained against any one of the underwriters.”

We still adhere to that. It would be an extraordinary thing to say that suit should be brought against the attorney in fact, there being no attorney in fact. Each of the underwriters undertook to be responsible for one-fifteenth part of the policy. The at-

torney in fact can not be found, or has ceased to be such. It would be difficult to determine what should be done if suit can not be brought against each of the several underwriters.

It is further claimed on the part of the plaintiff in error that McFall left Buffalo in 1896; that his whereabouts were unknown; that he not only left there, but ceased to reside there, had no place of residence there, and that service could not be had upon him in the county of Erie, in the state of New York, and that, therefore, the suit may be brought against the individual underwriters.

There was introduced in evidence in the case Section 425, also 426 of the code of procedure of the state of New York, as bearing upon the case as to whether summons could be served to bind McFall and those whom he represented. Without reading the provision, that where one has left the county of his residence and can not be found, that a copy of the summons may be left at the residence of the defendant with a person of proper age, if, upon proper application, an authorization can be obtained. And evidence was introduced in this case, upon the question of whether McFall still had a place of residence in Buffalo. The court charged the jury upon this as follows:

"I furthermore say to you, gentlemen of the jury, as a matter of law, if you find from the evidence that Henry S. McFall, at the time of the delivery of the policy to the plaintiff and at the time the loss occurred, was the general manager and attorney in fact of the defendant, and for a period of twelve months next after the fire had a residence or dwelling house in the city of Buffalo, New York, then the plaintiff was under obligation to commence its action against the said McFall as attorney in fact of the defendant and can not recover in this action, and your verdict will be for the defendant."

As applicable to the point now being discussed, the language complained of is: "If you find from the evidence that Henry S. McFall * * * for a period of twelve months next after the fire had a residence or dwelling house in the city of Buffalo"—the language of the statute being "If he has a place of residence in the county, service may be had by leaving summons at such place of residence."

It is said that this language ought not to have been used, because it authorizes service not authorized by the statute; and, on the other hand, it is said that the dwelling house and place of residence must be one and the same thing, although the language is: "If you find from the evidence that Henry S. McFall had a residence or dwelling house in the city of Buffalo."

In the record, on page 495, in the charge, the court said:

"And if you further find that the said Henry S. McFall did not have either a residence or dwelling house in Buffalo for a period of twelve months from the date of said fire, January 12, 1896, then plaintiff will be entitled to recover," etc.

We think there was error in the charge in this regard. This last clause was misleading. If we are right in holding that the language of the statute which provides for service of summons at one's place of residence, does not come within the language, "had a residence or dwelling house," we think the jury might very well come to the conclusion that inasmuch as this man owned a dwelling house or residence in Buffalo, though he did not live there, that if he owned the dwelling house in that city, though rented out, summons could be served there.

The use of the words, "or dwelling house," would imply that.

Again, in the charge, "If you find he had either a residence or dwelling house," this was calculated to mislead the jury.

But it is said it does not make any difference whether you could serve him or not, because of the provision of the policy. But we hold that that provision of the policy would not prevent one from bringing suit against the individual underwriters if service could not be made upon the attorney in fact.

The court erred, as we hold, in its charge to the jury in what has already been read, and also in giving the following:

"And I furthermore say to you, that in case you find from the evidence that Henry S. McFall, at the time of the delivery of the policy to the plaintiff, and at the time of the fire was general manager and attorney in fact of the underwriters whose names are appended to the policy; no action on the part of McFall in resigning, or attempting to resign, and no action on the part of the defendant accepting said resignation, would abrogate that clause of the policy wherein it is provided that no action shall be brought to enforce the provisions of the policy, except

against the general manager as attorney in fact, but the plaintiff had the right, and was under obligation to bring its action against McFall according to the provisions of the contract, and the defendant be estopped to deny the right of the plaintiff to so bring its action."

This is in direct conflict with what was said by this court before, and the case is reversed for these errors in the charge of the court.

There were some requests made involving practically the same propositions, which were refused, and, to the extent that they did involve the exact propositions, these or their equivalent should have been given. Requests numbered four and eight should have been given in the words or substance as the court was requested to give them, and it follows, therefore, that for these errors the judgment of the court below is reversed and the cause remanded to the court of common pleas for a new trial.

R. M. Lee, for plaintiff in error.

Goulder, Holding & Masten, for defendant in error.

BENEFICIAL ASSOCIATIONS.

[Circuit Court of Cuyahoga County.]

COURT FOREST CITY NO. 10, FORESTERS OF AMERICA, v. ROBERT RENNIE.

Decided, July 24, 1903.

Sick Benefits—Reduction of by Proceedings Regularly Conducted—Rights of Members Receiving Benefits at the Time the Reduction is Made—Where There is no Affirmative Provision as to Change in By-Laws.

The rights of a member of a beneficial association, with reference to the drawing of sick benefits, are to be determined by the by-laws of the association as they stood at the time his sickness began; and a by-law adopted subsequent to the beginning of such sickness, which reduces the benefits to be paid, is without effect as to such member.

MARVIN, J.; LAUBIE, J., and WINCH, J., concur.

Error to the court of common pleas.

Suit was brought by Robert Rennie, hereinafter spoken of as plaintiff, against the plaintiff in error, hereinafter spoken of as defendant.

The defendant is a corporation organized under the laws of Ohio as a beneficial association, and conducts its business in pursuance of its constitution and by-laws.

The plaintiff was a member of the defendant association and became sick while a member in good standing, and brought his suit to recover sick benefits.

A jury was waived and a trial had to the court upon an agreed statement of facts. The result of the trial was a finding and judgment in favor of the plaintiff. By proper proceedings the case is here for review upon error; a bill of exceptions is filed with the petition in error setting forth all the evidence introduced at the trial, and such evidence consists solely of said agreed statement of facts. Said agreed statement of facts is in the following words:

“It is agreed that the facts in this case are as follows:

“Defendant is a corporation duly incorporated under the laws of Ohio.

“Plaintiff, Robert Rennie, became a member of defendant lodge in the year of 1876, and paid his dues therein regularly until May, 1900, but at that time ceased to pay dues, and is still in good standing by reason of the following by-laws. Section 12, page 18:

“‘If a member not in arrears should be taken sick, he can not become delinquent while sick, or be deprived of his weekly benefits, but his dues shall be deducted from his benefits. But no unfinancial member shall be entitled to benefits.’

“That on or about the—day of—, 1883, he became disabled by sickness and commenced to draw sick benefits. That his sickness continued from that time up to the time of the commencement of this suit, and that he is a helpless invalid, unable to pursue any business avocation, and confined to a wheel chair for means for locomotion.

“That he drew sick benefits from about the—day of—, 1883, until the 22d day of February, 1900.

“That the defendant lodge then refused and continues to refuse to pay any sick benefits to the plaintiff.

“That at the time plaintiff commenced to draw sick benefits he did so under Article IV, Section 1 of the by-laws, which reads as follows:

“‘Each member of this court who shall be disabled by sickness or injury to his person from following any business avocation (provided such sickness or injury shall not have been occasioned by his own improper conduct), and who shall have been a member thereof, by initiation for six months, or upon clearance for three months, shall be entitled to benefits as follows: Five dollars (\$5.00) per week for sixteen weeks, two dollars and fifty cents (\$2.50) for the succeeding sixteen weeks and one dollar (\$1.00) per week as long as the sickness continues, provided,’ etc.

“That on April 19, 1899, the above by-law was amended in accordance with the provisions of Article X, Section 2 of the by-laws which reads as follows:

“‘No alterations, additions or amendments to these laws shall be made unless written notice thereof be given at the meeting of court previous to being acted upon, which shall be a summons meeting, and then concurred in by a vote of three-fourths of the members present. Provided, however, that nothing herein shall prevent a suspension of the rules for immediate purposes, by a four-fifths vote of the members present at any regular meeting.’

“That the said amended by-law is now known as Article VI, Section 1, and reads as follows:

“‘Each member of this court who shall be disabled by sickness or injury to his person, from following any business avocation (provided such sickness or injury shall not have been occasioned by his own improper conduct), and who shall have been a member thereof for six months, shall be entitled to benefits as follows: \$2.50 for the first week of sickness, then \$5.00 per week for the next twelve weeks; then if his sickness still continues he shall receive \$2.50 for the next thirteen weeks, then all benefits shall cease for said sickness; provided,’ etc.

“That said amended by-law was confirmed by the executive committee of the grand court of Ohio, and became effective on or about the 9th day of December, 1899.

“That the plaintiff has exhausted his remedies in the lodge tribunals, and has conducted nine appeals, in accordance with Article 18, Section 21 (e) of the constitution and general laws of the Foresters of America, which reads as follows:

“‘A member shall not resort to the civil courts for redress for an alleged injury until he has exhausted every means of

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appeal in the order. The penalty of non-compliance with this law shall be expulsion from the order.'

"That plaintiff prevailed in but one of said appeals, the fourth or fifth, and was defeated in all the rest; and that the delay in commencing suit herein was owing to the time necessarily occupied in prosecuting said appeals.

"That plaintiff is entitled to amount asked for in his bill of particulars, unless his rights are barred by the passage of said by-law known as Article VI, Section 1, above given, and all questions herein are waived save the question as to whether said passage of said by-law deprives plaintiff of further rights to sick benefits by reason of said disability."

It will be seen that the only question here to be considered is as to the effect of the amendment to the by-laws enacted April 19th, 1899. If the plaintiff is bound by this by-law, the judgment of the court below was erroneous; if he is not so bound, then the judgment was right.

The sickness of the plaintiff, on account of which he claims to recover, came upon him in 1883 and has continued ever since; this was something like sixteen years before this by-law was amended. At the by-law stood in the beginning of this sickness, the plaintiff was entitled to receive from the defendant five dollars per week for sixteen weeks, \$2.50 per week for the succeeding sixteen weeks, and \$1.00 per week from that time on until the termination of such sickness. He did receive the \$5.00 per week and the \$2.50 per week for the entire time provided for in this by-law, and \$1.00 per week up to the time when the amendment was made. Of course, if he is bound by this amendment, he is entitled to nothing more, as the time provided for in the amended by-law has long since elapsed.

The right to make and bind its members by the amended by-law is claimed on the part of the defendant by reason of Article X, Section 2 of the by-laws, which was in force at the time the plaintiff became a member of the association, which is as follows:

"No alterations, additions or amendments to these laws shall be made unless written notice thereof be given," etc.

It will be noticed that there is no affirmative provision here that the by-laws may be amended; that they may be amended is implied from the language used, the provision being simply that

they can not be amended except by pursuing the course pointed out by this law.

When the plaintiff became a member of the association he, of course, bound himself to be governed by the constitution and by-laws of the association. Did this bind him to be governed by the amended by-law passed after his right to draw benefits because of sickness accrued? The answer to this question is by no means free from doubt. Numerous cases are found in the reports in which it has been held that where there is a by-law of such an association as this, affirmatively providing for amendments to the by-laws, a member is bound by such amendment even though made after the right to draw sick benefits accrued.

In *Stohr v. San Francisco Musical Fund Society*, 82 Cal., 557, this language is used in the first clause of the syllabus:

“A by-law of a mutual benefit corporation which provides for the payment of a weekly sum to members in case of sickness (without specifying how long such payment shall continue) may be changed after sickness has commenced, so as to limit the period such payments shall continue after such change, but not so as to effect payments which have become due before the change.”

The second clause of the syllabus reads:

“The foregoing does not depend upon an express power to change reserved by the by-laws. The contract resulting from the by-laws will be construed with respect to existing statutes authorizing a change, which statutes will be held to enter into and form a part of the contract.”

One of the defenses set up in the case last named was that a change had been made in the by-laws altering the amount to be paid to the beneficiary, and that such change was authorized by a by-law in force at the time the plaintiff became a member of the association. Another defense made was that this change had been made in the by-law as to the amount to be paid to the beneficiary, without showing any by-law authorizing such change to be made. But the court say, as shown by the last clause of the syllabus hereinbefore quoted, that the change in the by-law as to the amount of benefits could as well have been made without as with the by-law expressly conferring the right to make such amendment.

Section 3630, R. S. O., provides, in express terms, that the constitution and by-laws of such associations may be changed or amended, so that the reasoning of the California court, if followed by us, would result in our holding that it is a matter of indifference whether there is any affirmative provision in the by-law of the defendant for their amendment or not. There is, however, an intimation that if the time for which benefits are to be paid is fixed by a by-law existing when such sickness begins, the change thereafter made could not affect the beneficiary. This intimation is shown by the words in parentheses quoted in the first clause of the syllabus. Those words are:

“Without specifying how long such payments shall continue.”

The case under consideration by the California court was one in which it was provided that a member “in case of sickness or accident by which he is incapacitated from following his profession, be entitled * * * to receive the sum of ten dollars per week, to take effect from the day of such notice.”

This differs from the case now under consideration in that in the present case the by-law as it existed when the sickness began provided for payment during the continuance of such sickness.

In the California case it is said by the court, on page 561 of the opinion:

“Now, under the contract, nothing was due before the sickness took place. Benefits do not accrue for future sickness. The right of the plaintiff to benefits for future sickness is not different in its nature from the right of the well members to benefits for future sickness. In the one case, the members have a right to future payment *in case they become sick*; in the other, the plaintiff has a right to future payments *in case he continues sick*. And if there was no power to change the by-law in the one case, there was no power to change it in the other, which is equivalent to saying that there was no power to change it at all. * * *

“It might perhaps be argued that the foregoing would apply, even if the by-law under consideration had specified that the weekly payments were to continue as long as the sickness continued. But it does not so specify. The time during which the payments were to continue is left indefinite. The substance of the contract is, in our opinion, that in case of sickness the member is to receive weekly payments for an indefinite period

of sickness, subject to the power of the defendant to change the provision authorizing such payments, so far as future payments are concerned.”

As already said, the intimation is very strong, that if the provision of the by-law in force at the time the sickness began had provided that the payment should be made so long as such sickness continued, the result would have been different. It is, perhaps, not quite clear why the result would have been different, because the reasoning is that there was no vested right in the beneficiary to have payments made while the sickness continued, more than there would be a vested right in a member to have payments made in case he should become sick. However, in the present case, we might hold that the plaintiff was entitled to recover, without holding contrary to this California case. There are cases, however, which seem to go further than the California case, notably that of *Fugure v. Mutual Society of St. Joseph*, 46 Ver., 362. In this case, suit was brought by the widow of a deceased member; the provision of the by-laws in force when the decedent became a member provided for a payment of twenty-five cents per day to the widow of a deceased member as long as she remained a widow; there was also a by-law then in force authorizing changes to be made in the by-laws. In January, 1869, the husband of the plaintiff died, he being then a member of the association in good standing. Six months thereafter the by-laws were amended, so as to provide that the aggregate amount to be paid to any widow under the twenty-five cent per day rule, should be two hundred dollars; this sum had been paid to the widow, and it was held that she was bound by the amended by-law and could recover nothing more. The reasoning in this case does not seem to us to be sound. When the husband died the rights of the widow under the contract as it then stood became fixed, and to permit the association to reduce the amount to be paid by the adoption of a by-law was to permit it to repudiate an obligation already incurred and fixed by the death of the husband.

Many cases are cited to us in support of the position taken by the defendant, which more fully commend themselves to our judgment than the former case referred to. See *Bowie v. Grand*

Lodge No. 34, Pac. R., 103. On the other hand, cases are not wanting in support of the position of the plaintiff that no by-law can be passed after the sickness begins, by reason of which the beneficiary is entitled to payments which can affect his right to payment during the continuance of such sickness.

The case of *Becker v. Berlin Beneficial Society*, 144 Pa. St., 232, is directly in point, and the reasoning of the court commends itself to us. In speaking of the amendment made to the by-laws of the association by which the amount to be paid to the beneficiary was reduced, this language is used on page 235:

“This was certainly an easy mode of relieving the society from an obligation, and, if successful, will doubtless be followed by other similar associations. The difficulty in the way of this convenient mode of paying debts is that it is repudiation, pure and simple. The argument that the plaintiff, being a member of the society, is bound by the by-law, does not meet the difficulty. It may be a good by-law as to future cases, but at the time it was passed the plaintiff was something more than a member. He was a creditor whose rights had previously attached, and those rights can not be swept away by such a scheme as this by-law.”

See, also, *Starling v. Supreme Council*, 108 Mich., 440; *North-west Benevolent Association, etc., v. Warner*, 24 Ill. App., 357; *Wist v. Grand Lodge, etc.*, 22 Or., 271.

As already said, the answer to the question involved in this case is by no means free from doubt. This is apparent from the authorities already cited, showing that the courts of last resort in different states have made different answers to the question, and whichever answer is given, the result, when it is worked out, may be such as to work an apparent injustice in a given case.

If the by-laws of an association like the defendant may be amended so as to reduce the amount of sick benefits which will be paid to one who *after* such amendment shall become sick, and can not be so amended as to reduce the benefits to be paid to one who *is already sick at the time* such amendment is made, the situation may be this: That A becomes sick on the 14th day of a given month; on the 15th day of that month the amendment is made reducing the benefits to be paid to a sick member below

what they were fixed at by the law in force on the 14th; on the 16th of the same month B becomes sick. Now to say that A shall receive a larger payment on account of sick benefits than B, seems to work an injustice upon B or else to be granting a special favor to A; and yet there is this difference: That when A's sickness began, the event had happened which fixed a right in A to at once receive something from the association; *that something* was the sick benefit provided by the by-law then in force, and in the case at bar was to continue so long as the sickness continued, while in the case of B the event which fixed an indebtedness from the association to *him* did not occur at the time when the higher payment was that provided by the law. It would seem that this distinction is such as to give a right in A not possessed by B. When the by-law was passed, A's rights had been fixed by his becoming sick, and fixed under the *old* by-law. When B became sick *his* rights were fixed, and fixed under the *new* by-law.

Perhaps an equally and possibly more troublesome case might be this (to reason this out entirely logically): A becomes sick. The by-law in force at the time he becomes sick gives him the larger sick benefit. Thereafter an amendment is passed in pursuance of the statute of this state and in pursuance of the by-laws of the association. Such amendment is passed reducing the amount. Now to say that if he continues sick, no matter how long that sickness may continue, he shall receive the larger amount, but that if he gets well and remains well three days and again becomes sick, he shall receive the lesser amount provided by the amendment, affords a case, as already said, by no means free from doubt.

The opinion of Judge Harmon of the Superior Court of Cincinnati, in the case of *Pellazzino v. The German Catholic Society*, reported in the 16th Law Bull., 27, seems to us to be sound. And we hold that the plaintiff's rights are to be determined by the by-law as it existed at the time his sickness began, and the judgment of the court of common pleas is affirmed.

Edward David, for plaintiff in error.

Harold Remington, for defendant in error.

SPECIAL BENEFITS RESULTING FROM STREET IMPROVEMENTS.

[Circuit Court of Lucas County.]

JOSEPH L. YOST, TREASURER, v. TOLEDO & OHIO CENTRAL RAILWAY CO.

Decided, 1902.

Street—Improvement of—Special Benefits Resulting Therefrom—Assessment in Excess of Benefits—Separate Parcels With Differing Benefits Belonging to Same Owner—Estoppel—Injunction—Burden of Proof.

1. The fact that installments of a street improvement assessment have been paid for a number of years without objection, does not estop an abutting property owner from interposing the defense that the amount assessed was in excess of the special benefits resulting to the property, where it is shown that the improvement was made without notice to the abutting owner or knowledge on his part.
2. The burden of proof in such a case rests upon the abutter to establish that the assessment exceeded the special benefits resulting to his property.
3. Where the abutter owns property on both sides of the street improved, and the testimony is to the effect that the installments already paid on the assessment equal the benefits as to one parcel but that the benefits exceed the full assessment levied against the other parcel, an injunction will lie against the collection of further installments against the first parcel, but not as to the second parcel.
4. In such a case each party will be required to pay his own costs.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on appeal.

This case comes into this court by way of appeal. It is an action by the treasurer to recover certain taxes and assessments. The question presented to us for consideration and decision relates to certain assessments levied upon the property of the railroad company on account of the cost and expense of paving Bridge street, running along the premises in East Toledo, extending from Front street in East Toledo to the Cherry street bridge, the part of it running between a certain tract of land

belonging to the railroad company, constituting the western approach to the bridge. This street improvement was made in 1891; and the assessment was levied by ordinance passed upon January 4, 1892. The assessment upon the property abutting upon the improvement was made by the foot front rule, and part of the cost of the improvement was assessed upon the street railroad which traverses this street; the remainder was assessed one-half upon the general tax duplicate of the city and one-half on the property abutting on either side of the street according to the foot frontage, and this made the amount of the assessment upon the abutting property about \$5.00 per foot front.

No objection to this assessment appears to have been made by the defendant railroad company at the time it was made; and the assessment which was spread over a period of years (the years 1892 to 1901, inclusive), have been paid from time to time by the railroad company without objection, until it came to the assessment of 1899, when it declined to pay further, upon the ground that it had already paid as much as the special benefits accruing to its property, that is to say, an amount equal to the special benefits.

At the last term of this court we decided, upon certain facts then presented, that the railroad company had not received such notice of this proposed improvement and assessment, and such steps had not been taken with its knowledge, or it had not participated in the carrying forward of the improvement in such way as to preclude it from interposing this defense. In other words, that it was not absolutely bound or estopped; but we also held that, under the circumstances, the burden of proof rested upon the railroad company to establish that the assessment exceeded the special benefit accruing to its property, and upon that question the issue was made up, the evidence submitted, and the case presented at this session of the court.

The property of the railroad company consists of two parcels. It appears to have been so described in the proceedings for the improvement and assessment, and is distinctly so described in the petition of the treasurer in this case, in which he attempts to collect the assessment, and we think that the circumstances justify or indeed require that it shall be considered by us in this

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case as two distinct tracts, one of the tracts lying upon the north side of Bridge street, the other upon the south side. The tract upon the north side has a frontage upon the street of 868.84 feet. The total amount of the assessment upon this tract was \$4,264.77; of this amount there has been paid by the company \$3,189.31, leaving a balance unpaid of \$1,075.45. The frontage of the tract upon the south side is 740.10 feet. The total assessment upon that was \$3,641.21; of this there has been paid \$2,722.99, leaving a balance unpaid of \$918.22.

It will be seen that substantially three-fourths of the assessments have been paid on each side, in the neighborhood of \$3.75 per foot. I have not figured this out closely, but it amounts to about that. Now the property upon the south side has been somewhat improved. In a state of nature both tracts were under water; they constituted part of the shallow waters of the Maumee river upon the eastern side of that river, and improvements have from time to time encroached upon the river, and the river has been filled in. Upon the south side the railroad company has filled in its track for some distance. It is conceded that about 500 feet of this 741.10 feet upon the south side is filled in, and the company is, and at the time of the making of this improvement was, utilizing it for its freight depot and yards, its passenger depot and tracks, etc.

These properties have a frontage also upon the river. Extending out beyond these limits indicated by the foot frontage upon the street, they have a right to erect docks. The railroad has not availed itself of its river frontage by building any docks, or by otherwise utilizing the property. It is said by witnesses that ultimately, as the city grows, in all probability the property will be useful and valuable on account of its river frontage and its dock privileges on the north side. However, there has been no filling in of this shallow part of the river, and so far as present utility is concerned, or any present use that is made of the property, it is practically waste swamp land. The water over it is not deep enough for navigation, and it is rather too deep for other lines of business.

It is said, however, by witnesses, that the property has been improved generally, that is to say, its value has been increased,

and that this increase has been somewhat special in its character by reason of this improvement, notwithstanding the fact that the part upon the north side is not at present utilized. As to the extent of this benefit the witnesses differ widely. It is apparent that it is somewhat speculative; that is, it depends upon the growth of the city and the future use that may be made of the property; at present the street improvement is really of no use to the property. But, as I have said, witnesses say that it has increased its value, its market value, and we are not prepared to say that this is not a special benefit that may be considered and form the basis of a special assessment. But we are of the opinion, taking the testimony of all the witnesses into consideration, that the railroad company has already paid upon the tract upon the north side of the river fully up to the amount of the special benefit accruing thereto from this improvement; that the special benefit was not equal to the whole cost of the improvement or that part of the cost assessed upon this property; and that the amount paid, about \$3.75 per foot, is fully as much as the property was specially benefited, so that the defense as to that will be sustained.

I believe there is a prayer for an injunction, and that will be granted.

As to the tract upon the south side, we are of the opinion, from the testimony of the witnesses, that the 500 feet which has been filled in and utilized, as I have stated, has been specially benefited much more than the \$5.00 per foot assessed upon the property. In our judgment a fair consideration of the evidence warrants us in saying it has been benefited \$10 per foot for the 500 feet, and that would amount to \$5,000, which is much more than was assessed upon the whole frontage of 740.10 feet. As before stated, we are not asked to subdivide, and do not feel authorized to subdivide these tracts, and we consider them as entireties. The sum of \$3,641.21 was assessed upon this tract, \$2,722.99 has been paid and \$918.22 remains to be paid.

We are of the opinion that the railroad company has failed to establish that the total amount of the assessment upon the tract lying upon the south side of Bridge street exceeds the special benefit accruing thereto from the improvement; and, therefore,

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its defense as to that tract is not sustained. The decree as to that tract will be in favor of the plaintiff.

And in view of the fact that the parties each prevail as to one of the tracts, as to practically half of the controversy, the costs will be divided and judgment for part of the costs shall go against each party. Each party shall pay its own costs.

LIABILITY OF LANDLORD FOR MONEY LOST AT GAMING.

[Circuit Court of Hancock County.]

BELLE B. TROUT V. WILLIAM MARVIN.*

Decided, December Term, 1902.

Gaming—And Liability of the Landlord for Money Lost—Reversal of Judgment Against Him as Winner—Not Res Judicata as to Lien on the Property for the Winnings—Judgment Against the Winners Conclusive as to What—As to What Not Conclusive—Reputation of the Premises—Statute of Limitations—Judgment as Evidence in Subsequent Suit.

1. The test as to whether causes of action should be consolidated may be made at any time in any court where the causes are pending and a motion for consolidation is made.
2. Whether a consolidation should be granted will depend upon the issues as they appear at the time the motion is made, and the further question whether prejudice will arise from the fact that any evidence will be made competent as a defense by the consolidation, which would be incompetent on the trial of the cases or either of them separately.
3. The fact that in a former suit the question was tried whether the landlord was the winner of the money lost at gaming, did not necessarily involve the question whether the gaming was carried on in his property and with his knowledge, and therefore does not act as a bar under the rule (10 O. S., 45) that the particular controversy sought to be precluded was necessarily tried and determined.
4. In an independent action brought against a landlord to charge his property with the lien of a judgment against his lessees for money lost in gaming carried on in property belonging to him, the

* Affirmed by the Supreme Court, without report, March 15, 1904.

statute of limitations does not begin to run until the rendition of the judgment against the lessees.

5. Under the issues joined in such a case the plaintiff must prove the rendition of the judgment, and that the premises were leased by the defendant to the parties against whom the judgment was rendered for the purpose of gambling or gaming, or with his knowledge they were so used, and that the money sought to be recovered was lost in said premises; and the burden of proof as to all these facts is on the plaintiff.
6. Knowledge on the part of the defendant landlord that the premises were used for the purposes of gaming may be proved by evidence that the fact of their being so used was a matter generally known and talked about and of common reputation in the community where he resided.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

Heard on appeal.

These cases are submitted together:

First. On motion of defendant to consolidate the two cases, to-wit, cause No. 965 with cause No. 966 in this court, under Section 5120, Revised Statutes of Ohio.

Second. On the merits presented in the pleadings and evidence.

Considering the questions in this order, case No. 965 was commenced in the common pleas court of this county, being case No. 11,689, on March 7, 1896; case No. 966 was commenced in said court March 9, 1897, being case No. 12,311.

The petitions are substantially alike, excepting as to the time and the amounts of the respective judgments set forth therein. The time of the recovery of the judgment in case No. 965 covered a period of time from March 20, 1893, to March 19, 1894, and is a judgment in favor of the plaintiff herein, and against James Clifford and Jacob Gossman for \$3,473 damages, and \$143.97 costs of suit. The judgment declared on in case No. 966 was recovered in case No. 12,311, in said court, against the same defendants, and covered a period of time from March 19, 1894, to June 19, 1894, and was rendered at the September Term, 1896, of said court, and for the sum of \$1,300 damages, and \$11.23 costs of suit.

There are other material allegations common to both petitions, which may be summarized as follows: That the defendant, Wil-

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liam Marvin, was, at the time the actions were commenced, and still is, the owner of the real estate described in the petitions; that during all the period of time from March 20, 1893, to March 19, 1894, as well as from March 19, 1894, to June 19, 1894, said Clifford and Jacob Gossman occupied certain rooms in said premises of said William Marvin; and during all of said times they were engaged in carrying on the business of gaming and gambling for money, in violation of law; that during all of said periods of time the defendant knowingly permitted said rooms and premises to be so occupied and used by said Clifford and Gossman for such gaming purposes.

That said original actions, to-wit, causes No. 11,689 and 12,311, were brought by said plaintiff, pursuant to Section 4273, Revised Statutes, against Clifford, Gossman and said William Marvin, for money staked and bet by one Frank H. Trout, husband of plaintiff, with said parties named, in certain gaming transactions; that such proceedings were duly and legally had in said actions, that the said judgments, hereinbefore mentioned, were rendered in favor of plaintiff and against said Clifford and Gossman, and which judgments are still in full force against said Clifford and Gossman, unreversed, and no part of either of said judgments has ever been paid.

That said games on which said moneys were staked, bet and lost, and for which said judgments were recovered, were played within the period of time hereinbefore mentioned, at and in the rooms and building of defendant, he knowingly permitting the same to be occupied and used by said Clifford and Gossman for such gaming purposes.

The prayer of plaintiff's petition is for a decree declaring said judgments a lien on said premises, and for an order for the sale thereof to satisfy said judgments, interest and costs.

The defendant filed an answer in each case, setting up two defenses in the first case, and three in the second. In the first defense in each case he admits his ownership of the premises described in the petitions; that the same were occupied by Clifford and Gossman during the period stated in the petition; that plaintiff recovered judgments against Clifford and Gossman at the times and for the amounts stated in the petition. All other

and further allegations of the petition are denied, and he specially denies that he knowingly permitted said rooms and property to be used by said Clifford and Gossman for gambling purposes, and if said premises were so occupied and used by them, he had no knowledge thereof, and in no manner consented thereto.

As a second defense in case No. 966, the judgment in cause No. 11,689 is plead as a bar to said action, or cause of action, set forth in case No. 966, wherein this plaintiff was plaintiff, and this defendant and others were defendants, being the same cause of action mentioned in the petition in case No. 11,689, wherein (in said cause number 11,689) the plaintiff undertook to recover from this defendant, William Marvin, the same sum of money which she seeks to recover in said action No. 966; that the plaintiff failed in said action to recover against this defendant for the reason she neglected or intentionally omitted in her petition in said action to allege against this defendant any facts showing his liability under the provisions of the statute; so that said action No. 11,689 is a bar to the maintenance of this action, to-wit, said action No. 966.

As further defense to the petition, and by way of amendment to the original answer, and as a second defense to the first suit, and as a third defense to the second, the defendant avers that plaintiff's causes of action were barred by the statute of limitations at the time she commenced her actions herein.

By reply plaintiff puts in issue the matters set forth in the second and third defenses of the answers.

Upon the issues thus joined the causes were tried in the common pleas court of this, Hancock county, March 14, 1902, resulting in a decree and judgment in favor of the plaintiff in each case; from which judgments and decrees appeals were taken to this court, and the causes have been submitted to this court:

First. On a motion to consolidate said actions, namely, cause No. 965 with cause No. 966, under Section 5120, Revised Statutes.

This section provides that:

"When two or more actions are pending in the same court, the defendant may, on motion, and notice to the adverse party, require him to show cause why the same shall not be consoli-

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dated; and if it appear that, at the time the motion is made, the actions could have been joined, and if the court, or a judge thereof, find that they ought to be joined, the several actions shall be consolidated."

It is important to know at what time the actions should or could be joined. Does it refer to the time the actions are commenced, or to the time the motion for consolidation is made? In the case at bar the motion was made after the causes came into this court and were pending herein on appeal.

From the language of the statute (Section 5120) it would seem the question as to consolidation of these cases is to be tested by the status of the causes in this court. "If it appear that, at the time the motion is made, the actions could have been joined, * * * the several actions shall be consolidated." We assume for the present that the test is to be made from the status of the cases in the circuit court, and not where the actions were originally brought in the common pleas.

The object of consolidation is to save costs, and prevent multiplicity of suits; it is regarded always with favor, and never denied, when it is clear the parties are the same, and the causes of action are identical.

Whether the causes of action are identical or not must be confounded with the object of the suits. The object or the relief sought in these suits is the same, namely, to subject the same real estate of defendant to sale to satisfy different judgments against the same parties but rendered at different times.

The causes of action in the two suits are clearly not identical as to the time of their accruing. When case No. 965 was commenced the judgment in cause No. 966 had not yet been recovered, and could not have been joined with the cause of action, to-wit, the judgment set forth in cause No. 965.

It is very clear, therefore, if the right to consolidate is fixed and to be determined at the time the first action was commenced, these actions could not have been consolidated, as the cause in No. 966 had not accrued at the time the first action was brought. Hence the two actions, or causes of action, could not have been joined when the first suit was commenced. This perhaps will furnish a sufficient reason why the tests of consolidation

are to be made, not when the suits are commenced, but at any time thereafter, in any court, where the causes are pending for trial, and a motion is made for their consolidation.

We are inclined to this view, namely, that the right to consolidate actions is to be determined by the court in which they are pending according to the issues as they appear at the time the motion is filed. Keeping in view the purpose of Section 5120, Revised Statutes, is the saving of costs to the party, it would follow that if any evidence were made competent as a defense by the consolidation, which would be incompetent on the trial of the cases, or either of them separately, the consolidation in such case might be prejudicial. To illustrate, in cause No. 965 there is no plea in bar to the plaintiff's right of action, by reason of the alleged former adjudication against her, in favor of the defendant, while in case No. 966 such a defense is plead. In the last case, No. 966, the record in case No. 11,689 would be competent evidence for the defendant, but not so in case No. 965, as no defense of a former adjudication has been plead.

Without pursuing the discussion further, we are of opinion that the motion to consolidate should be and is overruled.

Second. We will consider the cases together, not as identical or consolidated, but for convenience, as the main questions in each, both as to law and fact, are substantially the same.

The first question to which attention will be directed is the plea in bar set up in case No. 966, of the alleged former adjudication in cause No. 11,689, wherein it is averred that the plaintiff's cause of action, in case No. 966, was decided against her, and in favor of the defendant, William Marvin. A like defense is not plead in cause No. 965.

To determine the merits of this defense, it will be necessary to look into the pleadings in case No. 11,689, in the common pleas.

The object of the suit, case No. 11,689, was to hold the defendants, Clifford, Gossman and William Marvin, liable as winners of money lost at gaming under Section 4270, Revised Statutes. It is alleged that Marvin was the owner of the property where the gaming was carried on, and where the money was

lost. Such proceedings were had in the action, that the judgment recovered against Clifford, Gossman and Marvin, was reversed as to Marvin. The judgment recovered against Clifford and Gossman, in case No. 11,689, for money won by them at gaming, and which remains in full force and unreversed, a lien on the property of the defendant Marvin, wherein the gaming was carried on with his knowledge.

The defendant, by his second defense, raises the question as to whether or not said judgment in his favor is a bar to this action. We think this is settled against the defendant by the Supreme Court in the case of *Trout v. Marvin*, 62 Ohio St., 132. It is perhaps unnecessary to cite any other authority.

The issues tried in the former suit, as to Marvin being a winner of the money lost, did not necessarily involve the question now in dispute, namely, that the gaming in which the money was lost was carried on in defendant's property with his knowledge.

"Where a judgment or decree is relied on by way of evidence as conclusive *per se*, between the parties in a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined." *Lessee of Lore v. Truman*, 10 Ohio St., 45.

In *Betts v. Starr*, 5 Conn., 550, 553, Bristol, J., laid down the rule as follows:

"Where the cause or object of two actions is different, though the matter or point in dispute is the same in both, a prior judgment is no bar to a subsequent action."

The difference between the effect of a judgment as a bar to a second action on the same demand, and its effect as an estoppel between the same parties upon a different cause of action, is clearly stated in the syllabus in the case of *Cromwell v. County of Sac*, 94 U. S., 351, as follows:

"The judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

The object of this action is to charge the defendant and his property with the lien of the judgment rendered against Clifford and Gossman, for gaming carried on and for money lost therein, with defendant's knowledge. This being the purpose and object of the action, it is not affected by the judgment rendered in his favor in the former action, wherein he was only charged with his co-defendants, as a winner in the game.

This conclusion does not necessarily determine the question as to the competency of the record in the former suit as a matter of evidence as to what was expressly and necessarily adjudicated in the first action (*Betts v. Starr, supra*). Therefore, we think the record in the former suit is competent for either party in case No. 966, but not competent for defendant for the same purpose in cause No. 965, as no such defense is set up or plead in that action.

Third. Are the plaintiff's causes of action barred by the statute of limitations?

The actions are instituted, not for the purpose of creating a lien upon the property of the defendant described in the petition, but for the purpose of identifying the property upon which liens were created or secured by the judgments in favor of the plaintiff in the actions against Clifford and Gossman, under Sections 4270, 4273, and 4275, Revised Statutes, and for the further purpose of ascertaining judicially, as against the defendant, Marvin, as owner of the property, the existence of facts upon which the statute declares such judgments to be a lien. This being the nature and object of the action, it is important to ascertain when these causes of action accrued to the plaintiff. Did they accrue to her when the causes of action accrued against Clifford and Gossman, in which the judgments were rendered, after the judgments were obtained?

We are of the opinion and hold, that these actions against the defendant, Marvin, did not accrue until the judgments were rendered against Clifford and Gossman, whose unlawful acts caused the plaintiff's injury.

The defendant, Marvin, as owner of the property, was not a necessary party to the actions against Clifford and Gossman. The statute, however, declares that a judgment, rendered as

these judgments were, shall be a lien upon the property of the owner until paid. But as the owner was not a party, and is not a necessary party to the suits in which the judgments were obtained, such liens can not be enforced by execution, but by an independent action; and such independent action accrues against the owner when the judgments are rendered, and not before. Therefore, the statute of limitations commence to run in favor of the defendant from the rendition of these respective judgments.

Granting that Section 4983, Revised Statutes, controls in such case, these actions are not barred. Cause No. 965 was commenced March 7, 1896, and is predicated on a judgment rendered at the March Term, 1895, of the common pleas court, to-wit, March 21, 1895; and cause No. 966 was commenced March 9, 1897, and is predicated on a judgment rendered at the September Term of said court, 1896. We find as a fact that said actions, to-wit, causes No. 965 and 966, were each duly commenced within one year from the rendition of the judgments upon which said actions are respectively predicated, and are not barred by the statute of limitations.

In support of the conclusion of law, as to the statute of limitations plead in the third defense, the following authorities are cited: Section 4983, Revised Statutes; *Cooper v. Rowley*, 29 Ohio St., 547; *Binder v. Finkbone*, 25 Ohio St., 103; *Mullen v. Peck*, 49 Ohio St., 447, 460; *Trout v. Marvin*, 62 Ohio St., 132.

Fourth. The object of these suits, as we have seen, is to make the judgments, recovered against Clifford and Gossman for money won by them at gaming, a lien on the property of defendant, where the gaming was carried on with his knowledge. What is the legal effect of the judgments as against the defendant?

In an action under Section 4275, Revised Statutes, to subject the premises where the gaming was carried on and the money lost to the payment of a judgment recovered against the winner for damages caused by such gaming, such judgment, when not impeached for fraud or collusion, is conclusive as to the facts: (1) That the moneys lost and winnings secured, which caused the plaintiff's injury, were lost in gaming, and were won by the

defendant in the judgment; (2) that the same were lost and won in violation of law; and (3) that the plaintiff, in consequence thereof, sustained damage to the amount of the judgment. And such judgments as to these facts are not open to dispute, by the owner of the premises, in an action brought against him under said section.

But allegations that the premises were leased by the owner to the lessees or proprietors of the business for the purpose of gambling or gaming therein, or that the same were, with his knowledge used or permitted to be used by them for that purpose, and that the money lost and won, which caused the plaintiff's injury, was lost and won in the premises, may be put in issue by the owner; and when that is done, as to these facts, the burden of proof is on the plaintiff. *Goodman v. Hailes*, 59 Ohio St., 342; *Binder v. Finkbone*, 25 Ohio St., 103; *Mullen v. Peck*, 49 Ohio St., 447.

Fifth. Under the issues joined in these cases, the plaintiff must prove, in addition to the judgments against Clifford and Gossman, to subject the premises of the defendant, described in the petitions, to the payment of the lien and judgments under Section 4275, Revised Statutes: (1) That the premises were leased by the defendant, as owner thereof, to Clifford and Gossman to be used by them for the purpose of gambling and gaming; or (2) that with his knowledge he permitted them to use the premises for that purpose; and (3) that the money sought to be recovered was lost in said premises.

Considering the questions in this order, we do not think the evidence sustains the contention of plaintiff, that the premises were leased by the defendant to Clifford and Gossman for the purpose of being used by them for gambling or gaming. We do find as admitted facts, admitted by defendant's counsel, in open court, and for the purposes of these trials:

"That between the nineteenth day of March, 1893, and the twentieth day of June, 1894, the premises described in the petitions were used for gaming purposes by Clifford and Gossman, and that they are the same premises in which the money represented by the judgments set up in the petitions is claimed to have been lost. It is also conceded that the judgments were

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rendered against Clifford and Gossman. It is further conceded that Clifford and Gossman occupied no other premises and conducted no gambling, during the period specified in the petitions, except in the defendant's premises, referred to in the petitions as lot 86; and without admitting that plaintiff's husband in fact did gamble with Clifford and Gossman, between March 19, 1883, and June 20, 1894, it is admitted by counsel for defendant, for the purpose of this trial, that if plaintiff's husband did so, such gambling was done in the building, and upon the premises of the defendant, described in her petition."

With these admissions the material facts in dispute are reduced to substantially two questions:

1. Did the plaintiff's husband gamble at Clifford and Gossman's between March 19, 1893, and June 20, 1894? 2. Did the defendant with knowledge permit Clifford and Gossman to use said premises for the purpose of gambling?

1. On the first issue we find, as a fact, that the plaintiff's husband, between the dates set forth in her petitions, did gamble with Clifford and Gossman, as alleged in her petitions, and that the moneys sought to be recovered in these actions were lost by her said husband and won by said Clifford and Gossman, and in the premises owned by the defendant, which are particularly described in her petition.

2. Did the defendant have knowledge, or could he have had knowledge, by the exercise of reasonable care and diligence, that his said premises were so used, and had been so used during all the time between March 19, 1893, and June 20, 1894, by Clifford and Gossman for the purpose of gambling contrary to law?

Mere want of caution on the part of defendant will not be sufficient to charge him with knowledge of the unlawful use of his premises. But if he knew enough, as to the purpose for which they were being used by his tenants, to put a prudent man on inquiry, it became his duty to make reasonable inquiry, and if he failed to do so, he is chargeable with notice of the unlawful use. If a party obtains knowledge or information of facts sufficient to put a reasonably prudent man upon inquiry, then the necessary inference is, that he acquired the information which constitutes actual notice. 2 Pomeroy Equity, Section 597.

The principal contention on the facts is upon the last propo-

sition, and this contention arises mainly as to the competency of evidence offered by the plaintiff to sustain the issue on her part as to knowledge of the defendant. It being admitted that, between March 19, 1893, and June 20, 1894, that the premises described were used for gaming purposes by Clifford and Gossman, and that they are the same premises in which the money, represented by the judgments against Clifford and Gossman, was lost, for the purpose of proving the defendant's knowledge that his premises were so used, evidence is offered to show the general reputation in the neighborhood, or in the city of Findlay, where the premises are located and the defendant lives, that said premises were kept and used by Clifford and Gossman as a gambling place.

The rule as to such evidence is, that to prove knowledge of a particular fact, it is competent to show that such fact was at the time generally known and talked about in the neighborhood where the party to be charged with knowledge resided, or was a matter of common reputation in the business community where the party to be charged with knowledge lives. 1 Wharton Law of Evidence, Section 252; *Adams v. State*, 25 Ohio St., 584; *Lee v. Kilburn*, 69 Mass. (3 Gray), 594; *Heywood v. Reed*, 70 Mass. (4 Gray), 574; *Cobleigh v. McBride*, 45 Ia., 116.

The objective fact, namely, that Clifford and Gossman kept a gambling place in the premises of defendant being admitted, then to charge defendant with the knowledge thereof the reputation of the place may be shown to prove such knowledge.

We therefore hold that the evidence offered by plaintiff as to reputation of the place kept by Clifford and Gossman, so far as it related to the reputation in Findlay, or in the vicinity, is competent, and defendant's objection thereto is overruled; and the motion to rule out the same is overruled; exceptions noted. The evidence on the same subject, that tended to prove reputation elsewhere than at Findlay and in the vicinity, is ruled out, and the motion for that purpose is sustained.

All other objections of defendant to the evidence of plaintiff, not specially ruled on by the court at the trial, are overruled with exceptions noted.

The record evidence, namely, the records in original cases, in which the judgments against Clifford and Gossman were recovered, and offered by defendant to support his contention, that said plaintiff's actions herein are barred by the judgment in his favor in said original actions, and that such judgment is *res adjudicata* here, are not competent for such purpose, in behalf of defendant in cause No. 965, for the reason no such defense is made by plea in said action.

The records are competent evidence under the second defense, and the reply thereto, in cause No. 966; and the court hold that said record does not sustain defendant's plea, and said action No. 966 is not barred or affected by the judgment rendered in favor of defendant in said former action.

From the direct evidence offered by the plaintiff, being conversations had by her with defendant, in reference to her husband losing money at gambling at Clifford and Gossman's prior to bringing these original actions; circumstances of defendant being sued by others prior to these actions for money lost at the same place and in the same way, he taking part in the settlement of actions, where Clifford and Gossman with himself had been sued to recover money lost at gaming in these premises; and from the general reputation of the place, as being a gambling place, kept by Clifford and Gossman, we hold that the evidence is sufficient to charge defendant with actual knowledge of the purpose and use made of said premises, by his lessees, Clifford and Gossman.

The court having sufficiently indicated its finding of fact upon the issues joined in said actions, and also its conclusions of law arising in the cases, we hold that the plaintiff is entitled to the relief prayed for in her petitions, and a decree will be entered accordingly with costs.

To which findings of fact and conclusions of law the defendant excepts.

Motion for new trial filed and overruled; twenty days allowed for finding of facts; statutory time for bill of exceptions.

Poe & Poe, for plaintiff.

Phelps & David, J. A. & E. V. Bope, E. T. Dunn and Alfred Graber, for defendant.

DEFICIENT BILL OF EXCEPTIONS.

[Circuit Court of Cuyahoga County.]

FRITZ WOLF v. THE CLEVELAND CITY RAILWAY COMPANY.

Decided, November 23, 1903.

Direction of Verdict—Bill of Exceptions.

A bill of exceptions that does not contain all of the evidence offered upon the trial will not be considered for the purpose of reviewing the action of the trial judge in directing a verdict for defendant at the close of plaintiff's evidence.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to the court of common pleas.

On the trial of this case in the court below, at the close of plaintiff's evidence, the court directed a verdict for the defendant.

Motion for new trial was made and overruled, and a certain bill of exceptions was prepared purporting to contain in narrative form the substance of the testimony of the witnesses. The trial judge refused to certify that the bill contained all the evidence produced at the trial, and it is now urged by defendant in error, which was defendant below, that because we do not have before us all the evidence produced at the trial of the case, we should not consider the bill of exceptions for the purpose of reviewing the action of the trial judge in directing a verdict.

This court has several times ruled upon the identical proposition here submitted and has uniformly held that it can not consider the bill of exceptions for the purpose of passing upon the action of the court of common pleas in withdrawing a case from the consideration of the jury and directing a verdict for the defendant, where the bill of exceptions does not contain all the evidence offered upon the trial. Such was the ruling of this court in the case of *Charles Wadsworth v. The Cleveland Electric Ry. Co.*, and we see no reason for departing from it.

There being no errors complained of except the direction of a verdict by the court, the judgment is affirmed.

Hermann Preusser, for plaintiff in error.*Squire, Sanders & Dempsey*, for defendant in error.

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SALE OF LIQUOR TO MINOR BY CORPORATION.

[Circuit Court of Lawrence County.]

**THE LEO EBERT BREWING COMPANY AND OTTO EBERT v. THE
STATE OF OHIO.**

Decided, March 11, 1904.

*Corporation—Not Criminally Liable—For Sale of Liquor to Minor—
Proof of Sale—Does Not Sustain Charge of "Furnishing."*

1. In Ohio a corporation can not be held criminally liable, in its corporate capacity, for unlawfully furnishing to a minor to be drunk by such minor, intoxicating liquors in violation of Section 6943, Revised Statutes.
2. Proof of unlawfully selling intoxicating liquor to a minor, etc., in violation of Section 4364-21, Revised Statutes, does not sustain a charge of unlawfully furnishing intoxicating liquor to a minor.

CHERRINGTON, J.; JONES, J., and WALTERS, J., concur.**Error to the Court of Common Pleas, Lawrence County.**

At the October Term, 1903, of the common pleas court, this county, the defendants, plaintiffs in error here, were indicted jointly for violating Sections 4364-21 and 6943, Revised Statutes.

The indictment contained two counts, the first charging them with unlawfully selling intoxicating liquor to one Vint Lynd, a minor, knowing him to be such, etc.; the second, with unlawfully furnishing intoxicating liquor to Vint Lynd, a minor.

Each of the defendants filed a demurrer to the indictment for general cause, both of which were overruled by the court, whereupon the case went to trial by the court, a jury having been waived, resulting in a finding and judgment of acquittal as to both defendants on the first count and a finding and judgment of guilty on the second.

This proceeding in error is here asking for a reversal of the finding and judgment on the second count, assigning as errors the overruling of the demurrers to the indictment, and that the finding of guilty on the second count was against the manifest weight of the evidence.

The first assignment presents a very important question and one upon which this court has not before been called to decide, viz., as to whether in Ohio a corporation can be held criminally liable for the unlawful sale of intoxicating liquors in its corporate capacity.

The prosecuting attorney insisting upon the liability of the brewing company, presents an array of authorities among which are Hughes' Criminal Law, Section 2738; 1 McClain on Criminal Law, Section 417, *et seq.*; 1 Bishop's Criminal Law, 417, *et seq.*; 3 Greenleaf on Evidence, Section 9 and note; 86 Fed. Rep., 304, which seem to establish the principle that where a corporation in the transacting of its ordinary business performs an act which if done by a natural person would make such person guilty of a misdemeanor, it is likewise liable, and I think I may say with confidence that if there be an answer to this principle and the authorities cited, it is simply and only in the fact that there is no statute in Ohio making a corporation so liable.

"Whoever" and "person" are the words almost, if not invariably employed in our statutes to designate the one on whom a penalty is imposed for their violation; they are synonymous in meaning and refer to natural persons, and where an artificial person is intended it is so designated in the statute, an example of which is found in Section 6949, Revised Statutes, under the head of Nuisances, in which and following sections corporations are made expressly indictable. Section 7231, Revised Statutes, provides a mode of procedure against a corporation when indicted, meaning undoubtedly where properly indicted. To say that corporations should be held criminally liable for violation of statutes in the conduct of their usual business as are natural persons, would probably be argument in favor of what might be good policy, but certainly not as to the state of the law. Corporations act through their agents, who are amenable to the law for its violation, just as Otto Ebert in this case, who is secretary of the brewing company, as disclosed by the record.

The State of Ohio v. Cincinnati Fertilizer Company, 24 O. S., 611, I think decisive of the question. The fertilizer company was indicted for erecting and keeping up a nuisance in Cincinnati. The common pleas sustained a demurrer to the peti-

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tion. On final disposition in the Supreme Court, Judge Welch says:

"We think the court below was right. Criminal laws are to be construed strictly in favor of the accused. In its primary sense the word 'person' means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation; nor do I know of any case where any attempt has before been made in this state to indict a corporation. We have no common law crimes in Ohio, and the whole theory and machinery of our administration of criminal law seems adapted only to the prosecution and punishment of natural persons. There is no provision of law for bringing an indicted party into court by summons or otherwise, than by actual arrest of his person; under such a state of legislation and practice the Legislature could not have intended in the use of the word 'person' which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense without any special or further provision as to the liability of a corporation or the mode of proceeding against them."

We are constrained to hold that the brewing company is not liable to indictment for the violation of the sections of the statute involved, and the court erred in not sustaining its demurrer to the indictment, but did not err in overruling demurrer of Otto Ebert.

Is the finding of the court on the second count against the manifest weight of the evidence, which is indisputable and all one way, and shows a straight out sale for cash? The penalty for selling is both fine and imprisonment, while the penalty for furnishing is fine or imprisonment or both, thus seeming to recognize different grades of offense. We think that furnishing in the section under consideration means any mode of providing the minor with the liquor other than by sale. The proof does not support the allegations of the second count. The judgment will be reversed. The brewing company will be discharged, and the same remanded as to Otto Ebert, to be proceeded with according to law.

C. E. Belcher, for plaintiff in error.

E. E. Corn, Prosecuting Attorney, for the State.

COLLEGIATE ENDOWMENT FUNDS EXEMPT FROM TAXATION.

[Circuit Court of Greene County.]

THE UNITED PRESBYTERIAN THEOLOGICAL SEMINARY OF XENIA,
OHIO, v. ASA LITTLE, TREASURER OF GREENE COUNTY, OHIO.

Decided, March Term, 1904.

Endowment Funds—For the Support of a Theological Seminary—Constitute a "Credit" under Section 2732—And are Exempt from Taxation—Such an Institution a "Purely Public Charity" under the Ohio Constitution.

1. An institution for the education of young men for the gospel ministry, and open to all, is a "purely public charity," within the meaning of Section 2, Article XII of the Constitution of Ohio.
2. The endowment fund of such institution, which is loaned, and the interest used solely for the salaries of the professors and expenses necessarily incident to such educational work, is a "credit" within the meaning of Section 2732, Revised Statutes, and is exempt from taxation.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

Appeal. Demurrer to petition.

The plaintiff is an incorporated institution for the education and training of young men for the ministry of the gospel, open to persons of any sect or creed, but under the control and management of the Synods of the United Presbyterian Church of North America. It has an endowment fund of \$77,590, which the auditor of said county placed upon the tax duplicate, and upon which the defendant, the treasurer, is threatening to collect the sum of \$2,444 taxes.

Plaintiff brought this action in the common pleas court to restrain the collection of said tax, alleging itself to be an institution of purely public charity, supported by the income of said fund, loaned for said purpose, and that no part thereof has been, or is used for private profit; and that the placing of said sum upon said duplicate by the auditor was unlawful, and that the threatened collection of said illegal tax by said treasurer would be a great and irreparable injury to said plaintiff.

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To this petition the defendant filed a general demurrer, which was sustained by the court below, and the petition dismissed with costs.

Plaintiff appealed, and the case is before us on the merits of the general demurrer.

Two questions arise:

1st. Is the plaintiff, under its allegations of fact, as to its objects and purposes, really an "institution of purely public charity," within the meaning of Section 2, Article XII of the Constitution of Ohio?

This is conceded by counsel; but that concession not being conclusive of the law, we are cited to authorities which seem to settle the matter beyond controversy.

Gerke v. Purcell, 25 O. S., 229, holds that, "A charity, in a legal sense, includes not only gifts for the benefit of the poor but *endowments* for the advancement of learning," and that—

"Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are institutions of purely public charity within the meaning of the provisions of the Constitution which authorize such institutions to be exempt from taxation."

To the same effect are the holdings in *Myers v. Aikens*, 8 C. C., 228; *Sowers v. Cyrenius*, 39 O. S., 29; *Mannix v. Purcell*, 46 O. S., 102; *Davis v. Cincinnati Camp Meeting Ass'n*, 57 O. S., 257, and *McIntyre's Poor School Case*, 9 Ohio, 28.

2d. Is this fund, the principal of which is not touched, but is loaned, and the interest only used for the purposes of the institution, exempt from taxation?

Upon this question issue is taken.

Defendant claims that while the fund itself, if reduced to money and kept in the treasury for use as needed, would not be taxable; the moment it is placed at interest and becomes a source of profit, it is analogous to the leasing of real estate for business purposes, and, following the doctrine of *Cincinnati College v. The State*, 19 Ohio, 110, it becomes taxable.

In that case it appeared that the Cincinnati College borrowed money to improve its real estate, and, in order to obtain a revenue therefrom to repay the borrowed money, leased the lower

floor of the building to business men for stores; the purpose ultimately being, after payment of the debt, to use the revenue from the stores for the educational work of the college.

Under that state of facts the court held:

“The property of literary and scientific societies is only exempt from taxation when used exclusively for literary and scientific purposes. If used for other purposes it is liable to taxation, although the proceeds are in future to be applied for the promotion of literature and science.”

Inasmuch as the rental of real estate only was involved, the case was necessarily decided upon a construction of the third subdivision of the act then in force on the subject (44 O. L., 86), which included in the property that should be exempt from taxation, “All buildings belonging to scientific, literary, or benevolent societies, used exclusively for scientific, literary, or benevolent societies, together with the land actually occupied by such institutions, *not leased or otherwise used with a view to profit,*” etc.

Under that state of the law, and the admitted facts, the decision seems to have been highly just. But the learned judge who rendered the opinion, not satisfied with the undoubtedly correct conclusion to which the court had arrived as to subdivision *three* of the act in question, ventured to go beyond the single question then before that tribunal, and gave his individual views of what would be the construction of sub-division *four* of the act, which exempted “All moneys and credits belonging exclusively to universities, colleges, academies, or public schools, of whatsoever name, or to religious, scientific, literary or benevolent societies, and appropriated solely to sustaining such institutions or societies,” etc., and said:

“Whilst the money is in the fund of the institution, to be used solely to meet its expenditures, it is making nothing; it is withdrawn from the common business of life to be used solely to effect the object of such institution. But should the trustees of the society use such money in business, either investing it in property, or loaning it at interest, the property thus purchased, or the money thus loaned, would be liable to taxation as much as any other property or money at interest, no matter in whose hands it might be. As we have before intimated, the law applies

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to the property as it finds it in use, and not to what may be done with its accumulations in future."

But this construction of sub-division *four* is a mere *dictum*, and wholly *obiter*, as is expressly conceded by the judge, since he had previously stated that the third sub-division was "the only one that * * * could be supposed to have any bearing on this case."

We, therefore, are not bound by it as an expression of the law by the Supreme Court, and are free to give our own views upon the question, which are, that the word "credits," in the sixth sub-division of the statute now in force on the subject, and known as Section 2732, Revised Statutes, and providing for the exemption of "All moneys and credits to sustain, and belonging exclusively to said institutions," is broad enough to cover an endowment fund loaned to outside parties for the interest it may produce.

Such a fund when loaned can not better be defined than to call it a "credit," and such we believe was the purpose of the Legislature in so using it.

Any other interpretation would seem to put a premium on unthrift, and would be in direct conflict with the teachings of the parable of the servant who hid his talent in the earth, instead of putting it to the exchangers, and was rebuked for his slothfulness and wickedness (Matthew xxv, 26).

We also think it would be contrary to the policy of the state to hold otherwise.

The ordinance of 1787 announces as the policy of the Northwest Territory, that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Constitution of 1802 reasserts this policy, and emphasizes it by introducing the word "essentially" before "necessary," making it read, in Article VIII, Section 3, "Religion, morality and knowledge being *essentially* necessary to good government," etc.

And the Constitution of 1851, Bill of Rights, Section 7, in similar, but somewhat less felicitous language, makes the same announcement.

The consequence has been that a large number of educational institutions have been founded and liberally endowed, upon the faith of this wise state policy, and up to the present case no attempt has been made, so far as the court is aware, to place the burdens of taxation upon them, except as to real estate diverted from educational use.

Such a course would, in our opinion, be suicidal, and has never been contemplated by the Legislature. It would ruin one of the main sources of our power and influence as a state, and relegate the commonwealth to a less enlightened age.

Entertaining these views, therefore, as to the true construction of the statutes, and the policy of the state, the demurrer to the petition will be overruled.

C. H. Kyle and C. C. Shearer, for plaintiff.

Charles Howard, for defendant.

NEGLIGENCE IN RAISING HEAVY OBJECT.

[Circuit Court of Huron County.]

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. ROSE
WHIDDEN, ADMINISTRATRIX.

Decided, 1901.

Negligence—Oral Rules Governing Work in Shops—Dangerous Method Adopted by Servant for Doing Work—Defective Appliance—Negligence and Injury Without Casual Connection—Assumption of Risk—Question to Expert Witness Need Not State Entire Case—Exculpatory Evidence Necessary to Remove Presumption of Contributory Negligence—Charge of Court.

1. In questioning an expert witness as to whether a certain method of doing work would be safe, it is not necessary to state the entire case in one question.
2. A presumption of contributory negligence arises where there were two ways of doing a piece of work with reasonable dispatch, one absolutely safe and the other not, and the person injured pursued the latter method; and to remove such presumption requires exculpatory evidence.
3. Where one has used a certain appliance frequently for a long period, he may fairly be presumed to know its weakness, if it has any;

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and likewise if he is familiar with fresh paint he may be presumed to know that it renders a surface slippery.

4. A claim that the master was negligent in assigning two instead of three men to do a piece of work will not avail where there was no casual connection between the alleged negligence and the injury sustained by one of the men, nor where the risk was assumed by the men voluntarily and with full knowledge of the danger involved.
5. A charge to a jury is misleading when it singles out different acts as not sufficient alone to entail liability; it should not attach undue importance to any particular items of evidence, and the rules stated should be not only correct in the abstract but applicable to the issue in hand.

MOONEY, J. (sitting in place of Hull, J.); HAYNES, J., and PARKER, J., concur.

Heard on error.

In the court of common pleas Rose Whidden, administratrix, etc., as plaintiff, filed her petition and amended petition against the Lake Shore & Michigan Southern Railway Company, defendant, and therein alleged, in substance, that on June 17, 1897, her intestate, William Whidden, was in the employ of the Lake Shore & Michigan Southern Railway Company, in the shops of that company in this city, and that on that day he was called from his tank upon the floor of a locomotive tender; that in the performance of that work but two men were engaged, and that the appliances used for lowering the tank was a lever jack; that at the time in question there was no rule requiring the presence of any one to superintend the doing of the work, and that not enough men were employed in and about the doing of it to secure safety to the persons so engaged; that while so engaged, by reason of the want of a rule that should have been made by the railway company requiring three persons to be present, by reason of the absence of a superintendent, or one to oversee the work, by reason of the appliances used which were not suited to the work to be done, and by reason of the fact that the bottom of the tank had been recently painted, which fact was known to the railway company and not known to William Whidden, and while so engaged the jack slipped from under the tank and it fell upon the head of William Whidden and injured him so that he died, and the prayer is for a recovery of dam-

ages in this cause of action in the sum of ten thousand dollars.

To the petition and amended petition constituting this cause of action, there was filed by the defendant named, an answer in which it is first denied, in substance, that the defendant was guilty of any negligence as averred in the petition; and then as an affirmative defense it is charged that whatever injury occurred to the plaintiff's intestate was due or was contributed to by negligence of William Whidden himself; and next it is charged that at the time of his entering into the employ of the company he signed a written contract by the terms of which he agreed to inspect all appliances that might be used in any of the duties, to the discharge of which he might be called, and that he would report any defect or insufficiency of such appliances to the company. He also further agreed that he would not permit an order or direction of any superior officer to prevent him from taking time to make such inspection, examination, or to make such report.

For a third defense it is substantially averred that if the plaintiff was injured as alleged, it was due to the risk assumed in the employment, or in the discharge of the duties about which he was engaged.

The plaintiff, by way of reply, denies all three of these substantive or affirmative defenses set out in the answer, and upon the issues thus joined the case was tried to a jury, which resulted in a verdict for the plaintiff.

A motion for a new trial, one of the grounds of which was that the verdict was not sustained by sufficient evidence, was filed and was overruled. A bill of exceptions embodying all the evidence, requests to charge, the action of the court thereon, and the charge as given by the court, was filed and now error is prosecuted here by the defendant below to reverse this judgment.

The errors assigned are: There was error in overruling the motion for a new trial; that the verdict and judgment are against the weight of the evidence, and not sustained by sufficient evidence; that there is error in the admission and rejection of evidence to the prejudice of plaintiff in error; that there is error in the refusal of the court to charge as requested by de-

fendant below; and also error in the granting of the requests of the plaintiff below to charge before argument, as also in the general charge, as given.

The number of exceptions that have been called to the attention of the court are very great, and it will not be possible within any reasonable time to advert to each singly.

We may say, with reference to the objections to the evidence, that we find, except in a single instance, no valid ground of objection and exception by the plaintiff in error.

The question most made was as to the completeness of the question that was put to several witnesses called as experts, where they were asked: "Would it be safe for two persons to be assigned to do this work; would it be safe to use a lifting jack of the kind exhibited to the jury, in doing the work in the manner in which it was agreed by witnesses on both sides that the work was done?"

It is objected, to that question, that it was not stated: "Would it be safe for a man whose head was under the tank at the time, or would it be safe for the man who was doing the work?"

The plaintiff below was not bound to state his entire case in one question to the witnesses and ask whether it was safe, as ordinarily understood to be, was it safe for persons engaged in the work. To ask whether it would be safe for a person whose head was under the tank at the time it was being lowered, would not be necessary, the question being, generally, would it be generally safe for a person engaged in doing the work, being in a proper position; and if it was believed by the defendant below that this question was incomplete and did not meet the case fully, as it would be finally met and finally given to the jury, it was quite proper and quite usual to develop any additional facts by cross-examination as was done in every instance. We find upon this line of questions and the ruling of the court permitting this question to be answered, no error to the prejudice of the plaintiff in error.

On pages 131 and 132 of the record we find exception 70:

"Q. You may state to the jury whether or not there was any rule or instruction in this shop or in the tank shop or in the round house with reference to the use of wood—as a sort of

washer between the foot of the jack and the metal, a heavy metal substance to be raised?

"A. Yes, sir.

"Q. If so, how long had it been in force, or in existence?

"Mr. Andrews: I object to the question.

"Judge Wickham: I expect to show that the rule was communicated to Mr. Whidden; that it was not a written rule, but a verbal rule. I expect to show that he was instructed to lift.

"Mr. Andrews: I object to that statement.

"Court: I am inclined to think that upon this point, it would not be competent to show an oral rule communicated by Mr. Bradeen to the foreman.

"Judge Wickham: We except to the ruling of the court."

The effect of that action of the court was to deprive this defendant from showing that an oral rule was made, was in existence and was actually communicated to the plaintiff's intestate in the court below. The plaintiff below grounded her right to recovery upon an oral order to do the work. Actions of this kind are most commonly grounded and are frequently sustained upon oral orders. There is no requirement of law that orders to employes in railroad shops, any more than in any other department of industry should be directed by written rules, and we are quite clear that this question should have been answered, and that the exclusion of the answer under the statement was error.

After the close of the testimony it may be said with reference to this particular question—afterwards, this witness, in another form, was permitted to answer a question that to some extent met the offer of proof made by the defendant below, but not entirely so. While perhaps upon the record, as it stands with the other questions and answers, we would not feel that the error was such as to reverse this judgment, yet, in passing, for reasons that will appear further on, we desire to express the opinion that this question, in the form in which it was stated, should have been answered.

The second request of the plaintiff to charge, without reading it, because it is lengthy, is perhaps a correct statement of an abstract principle of law, but inasmuch as it does not embody or state the necessity of any casual connection between the fact stated to be negligence and the injury here in question, it seems

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to be viewed as an abstract direction embodying the law of some case, but not applied by its language to this case. It could not aid the jury, and we think should not in the form in which it was presented have been given.

The same as to the third request; and the same as to the fourth, fifth and sixth requests of the plaintiff. Some of these are found to be incorrect statements of law. Others are found to single out particular items of evidence and to attach, as we think, undue importance to such particular items of evidence, for we do not conceive it to be the purpose of the law to permit a charge before argument, to authorize parties to single out particular theories and particular parts of the evidence and hold them up to the jury and thus give them undue importance in the case, and certainly mislead the jury. We are all of the opinion that these requests, when presented, should be the statement of general rules, not only correct in the abstract, but so covering the case as not to give a one-sided view of some particular theory of counsel, or to attach undue importance to some particular items of evidence.

What has been said with reference to the plaintiff's requests will apply to all but one of the requests of the defendant. The plaintiff, in her petition, had charged that several things were done, and that as a result of this or of these several negligent acts injury happened. The defendant below, singling these out one by one, with the request to the court to charge the jury that any one of them, standing alone would not, as a matter of law, entail liability. That was unfair, misleading and improper charge to be given, as we think, to the jury.

However there was a request, number four, by the defendant below, which is in this language:

“That if the jury find that the tank in question was resting at one end upon the foot of the jack, with no other support, at an elevation at that end of from ten to fifteen inches, and that Mr. Whidden, for the purpose of reaching a piece of ‘blocking’ wholly within the coal pit, placed his arm and head under the tank, and that that piece of ‘blocking’ could have been procured by him with absolute safety to himself, by entering the coal-pit at its open end, a presumption of negligence on his part would arise; and that before the plaintiff can recover the burden

rests upon her to remove such presumption and show that he was exercising ordinary care by a preponderance of the evidence."

It may be doubtful whether or not, as an abstract proposition of law, as a statement of law applicable to all cases, this would be true; that is to say, whether the rule existed to the extent claimed by counsel for plaintiff in error in this case, that in all cases when there are two ways of doing work, or of accomplishing a given result, one absolutely safe and another attended with danger, that the adoption of the plan that is attended with danger raises the presumption of the negligence of the plaintiff. But in this case the evidence is not in dispute so far as applies to this instruction, and it amounts to a request; therefore, that if there were two ways of accomplishing the work with reasonable dispatch, that is a proper qualification of the rule.

To make my meaning clear, it is always possible with absolute safety to cross a railroad track. One might be attended by a messenger sent ahead to see that there is no danger; but if, instead of doing that, and for the purpose of pursuing his journey and his business with reasonable dispatch, he does not do it, because he does not surround himself with all precautions, and because he does not take the course that is in all situations absolutely free from danger, does not raise the presumption. But here, there is no showing in evidence but that this work to be done could have been done with reasonable dispatch by procuring blocking in some other way than by reaching through under the tank; and so we think that whether this request states a rule which is correct in all cases or not, under the conceded facts, or undisputed testimony, unquestioned evidence in this case, it does state a fact, and that is the purpose of an instruction to a jury not to state a general proposition of law that is correct, but to deliver instructions which will aid the jury in arriving at a proper verdict and such as the law requires. We think this request should have been given, and that its refusal was error.

We think that the criticisms of the general charge that were made in argument are not well taken; that the general charge fairly covered the case, and that in the absence of any request

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to make more particular statement, or in the absence of any specific objection at the time to particular language, that the general charge or the general result of the charge to the jury must have been to have given them proper information and in the light of which they should have arrived at a proper and just conclusion.

This leaves undisposed of the question as to whether or not this verdict is sustained by sufficient evidence. Many of the facts, and we think enough of the facts to dispose of this question, are not in serious dispute, although there may be slight matters of evidence against it. From the uniform trend of the testimony, and sustained as we think by the clear weight of the evidence, these facts may be said to have been presented to the jury and should have been determined by them to be the controlling facts in the case.

That William Whidden, plaintiff's intestate, a young man thirty-two years of age, of more than average intelligence, employed about these shops for three years or about that time, and for one year, or for one year and more, accustomed to be called from work in the round house which he was required to perform ordinarily, to assist in the lowering of tanks and raising of tanks from the floor of tenders; that he had on more than two dozen times used jacks and been engaged in blocking up and lowering down tanks onto the floor of the tenders; that on this day a jack was used; that it was placed under the tank, the tank being at an angle of from two-thirds of an inch to an inch to the foot; that it was placed in position by Whidden himself; and after the tank had been raised slightly from the blocking, he left the jack and the pit of the tender, got down from the tender floor onto the floor of the shop for the purpose of blocking the tank, for the general purpose of the employment; that when he got down to the side on which he was to place the blocking in position, there was no blocking there on that side; that blocking was situated in abundance at the other side of the tender; that it would have required six or eight steps for him to procure it; that, so far as the evidence shows, at that time the jack was securely in place and there was no apparent necessity of proceeding speedily to procure the blocking; that

for the purpose of gaining possession of the blocking he reached his arm under the tank thus raised, and between the tank and the floor of the tender, he placed his head under the tank; and while in that position, for some reason not explained here, the jack slipped and the tank fell down until its further progress was arrested by the goosenecks, and caused the injury which resulted in the death of Whidden.

We have said, in sustaining the requests of defendant for charge, that these facts raised a presumption of contributory negligence of William L. Whidden; the burden of proof then, under the well known rules of law, was for the plaintiff in the court below to remove this presumption, and that evidence, from the very requirement of the rule, must be exculpatory; it must show some reason; it must sustain some excuse; it must appear from other evidence that while this seems to be negligence, and that it seems William L. Whidden took the risk, that yet under the peculiar surrounding circumstances that the result does not follow.

We look in vain in this record for such excusing circumstances. It is in evidence, or it is suggested that the jack slipped, but it is in evidence on the part of the plaintiff below and rather emphasized, that the jack frequently slipped, and if that is true, if Whidden used it for more than two dozen times, it is not fair to presume, in the absence of all testimony to the contrary, that he knew something of the weakness of the jack in that particular? If the jack did not slip, if it was strong and did not slip, then the cause is unexplained in the evidence. If it frequently slipped, as the plaintiff's own testimony below tends to prove, then Whidden should have known it.

It is suggested that the paint caused it to slip, but for two hours on that morning, or about that time, Whidden was working around that tank; he had lowered it and raised it and had placed the tank in the position which it was at the time the injury happened. Now, if this paint was not dry, if it was soft, if it was said that the jack would slip when brought in contact with it, should not the fact that he had been engaged about the tank be some evidence of knowledge upon his part? But then the reason appears that the jack, if it slipped, should

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have slipped in the opposite direction from what it did. It slipped toward its bearing instead of away from it, and certainly that manner of falling could not tend to sustain the contention made by the defendant in error here, that the slipping was due to the presence of paint.

It is claimed that two men only were employed instead of three about this work. If that is true Whidden knew it. He went there, and there is no evidence that at any time for those two dozen times, that any more than two men were employed, and the weight of the evidence in this record shows clearly that the only difference between employing three men and employing two, is that when three men are employed the work can be done more quickly than when only two men are employed.

However, if three men had been employed, it does not appear that this injury would not have happened. If three men had been employed and one of them had been standing at his jack, still, if Whidden had placed his arm and his head under this tank, he would not have had time, by reason of any precaution or by reason of any warning given at the time, to have escaped. In other words there is no causal connection between this negligence, if there was negligence in not employing three men, and the injury that happened. The same is true with reference to rules.

Upon the whole case, while, as in all cases of this kind, we view this injury and death as a calamity to this family, yet we must recognize that the defendant below and the plaintiff in error here, is not an insurer; that the law does not exist for the purpose of distributing the burden upon persons who are guiltless. Under the rules of law, we must hold that Whidden, when he placed his arm and his head under this tank and was killed while he was in that position, can not recover; he could not, if he had survived, recover, and his administratrix can not recover, unless from the evidence there is something shown to excuse, or what seems to us to be clear evidence raising the presumption of his negligence.

Upon the whole case, for the reasons indicated, for error in excluding the evidence that has been indicated, in charging the requests of the plaintiff below that have been pointed out, and in

the refusal to charge the request by the defendant, because the verdict and judgment are not sustained by sufficient evidence, the judgment of the court below will be reversed and a motion for a new trial will be sustained and the cause remanded to the court of common pleas for further proceedings according to law.

Andrews Bros., for plaintiff in error.

C. P. and L. W. Wickham, for defendant in error.

ARREST OF DEFENDANT IN ATTACHMENT PROCEEDINGS.

[Circuit Court of Lucas County.]

DANIEL D. THOMAS v. WILLIAM H. MANGUS.

Decided, January 25, 1904.

Attachment—Arrest of the Defendant—Motion for a New Trial—Not Necessary for Review of the Judgment—On Motion to Dissolve Attachment or Discharge Defendant—Time for Filing Bill of Exceptions—Runs from Date of Judgment.

1. No motion for a new trial is necessary to authorize a reviewing court to review the judgment of a trial court, on a motion to dissolve an attachment, or discharge a defendant from an order of arrest before judgment (8 C. C., 636, approved and followed).
2. If a motion for a new trial is filed in such case, the filing thereof will not affect the time when a bill of exceptions must be filed, but the forty days allowed by the statute (Section 5301) for such filing begins to run from the date of the judgment of the court on the motion to dissolve or discharge.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought on a promissory note, and ancillary to the action an attachment was issued. No goods were found under the attachment, and, upon a proper showing being made, an order of arrest was issued before judgment, against defendant, and he was taken into custody as provided under the statute that he might be. A motion was afterwards filed to discharge defendant from arrest. This motion was sustained by the court of common pleas and the defendant discharged, and proceedings in error are prosecuted here by the plaintiff to re-

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verse that judgment. Upon the motion to discharge the defendant from arrest, evidence was offered by way of affidavits and orally, and that was all embodied in the bill of exceptions which is before us. It is claimed that this action of the court of common pleas was against the weight of the evidence. A motion was made to strike off the bill of exceptions for the reason that it was not filed in time in the court below, that is, it was not filed within forty days after the date of the granting of the motion to discharge the attachment by the court of common pleas, but a motion for a new trial was filed by plaintiff asking for a re-hearing, and that was not overruled until March 2, and the bill of exceptions was filed within forty days after the overruling of that motion for a new trial, and it is claimed by plaintiff in error that the forty days began to run from the time the court overruled his motion for a new trial, and that, therefore, he is within the statute. The bill of exceptions statute, the last one, which was passed October 22, 1902, provides, in Section 5301:

“The party excepting must reduce his exceptions to writing and file the same in the cause within forty days after the overruling of the motion for a new trial, or the decision of the court, where a motion for a new trial is not filed; thereupon the clerk shall forthwith notify the adverse party, or his attorney, of the filing of such bill.”

The motion for a new trial, according to the record, was not filed until four days after the order had been made; but it is claimed that a Sunday intervened and that that day should not be counted. And it is claimed by the plaintiff in error that a motion for a new trial was not necessary. But that claim is a two-edged sword for the plaintiff, for, if the motion for a new trial was not necessary, then the time of the filing of the bill of exceptions would be governed by the same rule as where no motion for a new trial is in fact filed. If a motion for a new trial is not necessary, then the filing of such motion would not extend the time for the filing of a bill of exceptions, but the forty days would begin to run from the time of the order of the court, the statute providing for the filing “within forty days after the overruling of the motion for a new trial, or the deci-

sion of the court where a motion for a new trial is not filed ;” the statute does not say where a motion for a new trial is not necessary, but says “where a motion for a new trial is not filed.” But if a motion for a new trial is filed where it is not necessary and is not required, it would not affect the running of the forty days or the time at which the forty days would begin to run. That a motion for a new trial in such a case is not necessary, we think is clear. In 56 O. S., 148 (*Minnera v. Holloway*), it is suggested that a motion for a new trial in such a case is probably not necessary. It was not squarely passed upon by the Supreme Court—as it was unnecessary to do so—but they say in the opinion :

“As new trials are only granted in proceedings in which there are issues of fact (Section 5305), what is said above about remanding cases for a new trial after reversing on the weight of the evidence, can not apply to orders and judgments made on hearings on affidavits or evidence, for injunctions, or for the vacation of an injunction, or the dissolution of an attachment, or motions for the appointment or discharge of receivers, or motions for the vacation of an order of arrest in a civil action and other like motions and proceedings in which no issues of fact are made up by pleadings, and there is no trial in the legal sense of the term.”

In the paragraph before this, in the opinion, Judge Burket, who delivered the opinion, says :

“In such cases the reversal by the higher court should not be on the ground that the verdict or judgment below was against the weight of the evidence, but that it was contrary to law, that is, that the court below erred in applying the law to such conceded facts. The motion for a new trial in such case, if such motion is necessary, should be upon the ground that the verdict or decision is contrary to law.”

As stated by the Supreme Court in this case, where the action of the lower court in such case is reversed, the case does not go back for a new trial as where there has been a trial upon issues of fact set forth in the pleadings, but the judgment is reversed and the court of common pleas is directed to enter the judgment that the reviewing court holds should have been entered. If an attachment has been discharged, if the reviewing court holds that that is against the evidence and against the law upon

the showing made, the case is sent back and the common pleas court is ordered to overrule the motion to discharge the attachment.

The Circuit Court of Cuyahoga County has held expressly that a motion for a new trial is not necessary in such a case, 8 Circuit Court Reports, 636 (*Stone, Assignee, v. Bank*):

“No motion for a new trial is necessary to authorize a reviewing court to review the judgment of the trial court upon a motion to dissolve an attachment, although the weight of the evidence is involved.”

The opinion was delivered by Judge Hale, and he says (page 639):

“It is said, first, that this question can not be reviewed in this court, because no motion for a new trial was made on the overruling of this motion. This is not an open question in this court. We hold that a motion for a new trial is not necessary to authorize this court to review the facts upon which the court below determined the motion.

“Section 5305, of the Revised Statutes, defines the causes for which new trial will be granted. The first clause of this section reads: ‘A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee or master, or a decision by the court.’

“Section 5127, of the Revised Statutes, defines an issue: ‘Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other.’

“We have held and now hold, that no issue of the kind here defined arises upon a motion to dissolve an attachment, and therefore a motion for a new trial is unnecessary.”

We think this is the law, and an order of arrest before judgment is an attachment of the person and subject to the same rule as when property is attached. So that when the court of common pleas granted the motion to discharge the order of arrest in this case, no motion for a new trial was necessary on the part of the plaintiff below to prosecute his proceeding in error in this court to review on the ground that the order of the court was against the evidence, and it seems clear to us that the time within which he must file his bill of exceptions must date from the time of the order of the court of common pleas sustaining the motion to discharge the defendant from the ar-

rest. That order was made on the 22d day of January, 1903. The bill of exceptions was filed on the 11th of April following, being 79 days after the date of the order and judgment of the court discharging the defendant.

The motion to strike the bill of exceptions from the files must be sustained; it not having been filed until a long time after the forty days had expired. This is fatal and this court has no jurisdiction to review the case upon the facts. There being no question raised in the case except as shown by the bill of exceptions—the weight of the evidence—it follows that the judgment of the court of common pleas must be affirmed.

Paddock & Johnson, for plaintiff in error.

Schunck & Thompson, for defendant in error.

LESSEE'S EQUITY IN BUILDING ERECTED BY HIM.

[Circuit Court of Lucas County.]

REUBEN J. LENT V. CHARLES F. CURTIS.

Decided, February 3, 1902.

Res Judicata—Equity Suit to Enjoin Forcible Entry and Detainer Proceedings—Not a Bar to Action by Lessee to Recover for Building Erected by Him—Landlord and Tenant—Word "Term" as Used in Lease—Refers to the Time the Lease Will Expire in the Absence of Default—Forfeiture Does Not Affect Lessors Right to Damages or Lessees Equities in Improvements—Insolvency of Lessor Not a Bar to a Suit by Him for an Accounting.

1. The dismissal generally and without a saving clause of a suit by a lessee to enjoin a proceeding in forcible entry and detainer by the lessor, based on defaults creating a forfeiture, is not *res judicata* as to the equity of the lessee in a building erected by him on the leased land, under a provision that at the expiration of the term the lessor would purchase such building at 70 per cent. of its appraised value.
2. The word "term" as used in such a lease refers to the time provided by the lease for the lessee's term to expire if there is no default, and the lessee is without a right of action until that time upon such a covenant of purchase.

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3. While a forfeiture of the lease is absolute, it in no way affects the lessor's right to damages on account of the default, or the lessees right to recover his equity in the improvements, and an accounting may be ordered.
4. A tender by the lessee of rent covering the entire term is not a prerequisite to a demand for an accounting, and his insolvency is not a fact which the lessor can avail himself of as a defense against the hardship of being compelled to enter upon litigation and submit to an accounting when the result will be to show a balance in his favor.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This case is here on appeal. It was brought in the court of common pleas of this county in the year 1891. It has been dragging along for something over ten years for some reason not explained, but it has but recently come into this court.

It is an action upon the part of Mr. Lent, who was at one time a tenant of Mr. Curtis and one Peter H. Birkhead, to recover the value of a certain building which he erected upon premises that were leased to him by them; and conceding that they would have certain claims against him to offset in a measure his claim for the value of the building, he asks for an accounting and a judgment for the remainder.

It appears that Mr. Lent became the tenant of Curtis and Birkhead of a vacant lot on Summit street, in this city, under a lease dated March 25, 1875. By the terms of the lease it was let from July 1, 1875, to July 1, 1890. Mr. Lent was to pay a rental of \$1,000 per year, payable in quarterly installments; but the lease contains a provision that at the expiration of five years there shall be an appraisement of the premises exclusive of the building which Mr. Lent agreed to put upon the lot, and that thereafter he shall pay for the succeeding five years at a rate equal to six per cent. upon the appraised value of the premises; provided, however, that the rent shall not fall below \$1,000 a year. And there is a similar provision as to the next succeeding period of five years, beginning with 1885. The lease contains a provision as to the erection of a building upon the premises, and as to the compensation therefor at the expiration of the term, which I shall read:

“Said party of the second part agrees to improve said premises by erecting a building thereon at a cost of not less than \$6,000, said building to be completed by the first day of September, 1875, or within a reasonable time thereafter, the foundation of which said building shall be lowered in the ground to a depth equal to that of the foundation of the adjoining building. It is further agreed by and between the parties, and the said parties of the first part (being the lessors) do hereby obligate themselves to purchase of the second part, his executors or administrators, at the expiration of said term, all the buildings which may have been made, erected and placed upon said premises by the party of the second part, and which shall at that date be suitable for business purposes, at a price equal to seventy per cent. of the actual appraised value of the same; said appraised value to be determined by three disinterested persons, to be selected in the manner aforesaid, the decision of any two of whom shall be considered final.”

“To be selected in the manner aforesaid” refers to the method provided for the selection of appraisers to fix the rental value of the premises. These appraisers are to be selected in the same way, one by the lessee, one by the lessors, and the third by the two thus chosen. Another part of the lease to which we shall have occasion to refer is that providing for the termination or forfeiture of the lease in the event that the lessee does not comply with certain conditions. That provides in part as follows:

“And it is further understood and agreed to, that if the said party of the second part shall fail to pay the rent aforesaid as the same shall become due and payable, according to the covenants aforesaid, and shall fail to perform any of the covenants and conditions on his part to be kept and performed, it shall and may be lawful for said party of the first part to re-enter and take possession of said demised premises, and expel said party of the second part, his heirs, executors or assigns, therefrom. And it shall not be necessary for the said party of the first part, or any other person in their behalf, to make demand for the payment of said rent at the time it shall become due and payable, or at any other time to entitle them to re-enter, any rule in law or equity to the contrary notwithstanding.”

The lease contains another provision to which I desire to make reference, to the effect that the lessor shall have a lien upon the building for the non-payment of rentals, taxes, assessments, etc., that reads as follows:

"It is also agreed that the party of the second part, in addition to the rents aforesaid, shall pay all taxes and assessments which may be levied or assessed upon said premises, on or after the first day of January, 1875, except payment of installment of said taxes for December, 1875, as the same may from time to time become due and payable, and that said taxes and assessments, together with the rents aforesaid to become due, shall at all times constitute a good and valid lien in favor of the parties of the first part upon the said improvements to be erected hereafter by the party of the second part upon the premises aforesaid; it being understood that the moneys to be paid for the sidewalk now laid are to be paid by the parties of the first part."

Immediately following this is the clause which I have read, providing for the erection of the building, and for the payment of seventy per cent. of its value in a certain contingency.

In the case at bar a petition, answer and reply have been filed, making up certain issues; and the question now submitted to us, after hearing certain evidence, is whether we should require this accounting. Our finding upon this occasion will not be the basis of a final judgment or a final order; but by agreement of the parties we are called upon to determine this preliminary question, in accordance with the principles of a court of chancery, in order that the parties may know how further to proceed.

It appears from these averments and from the evidence adduced that Mr. Lent went into possession of the premises under the lease, and erected a building upon them, being a substantial structure, designed for a theater, or for performances of some description, and that in this enterprise he became financially embarrassed, and was unable to pay all of the bills that he made in putting up the building. It appears that he started in to erect a building to cost \$6,000 or \$7,000, and that it cost him perhaps more than twice that, and he was not able to pay the contractors and material men. The result was that an action was instituted to foreclose mechanic's liens. The lessees were made parties to that action, and by way of answer and cross-petition they set up their claim for the accrued rents, and their lien as a first lien upon this building, as provided in the lease,

and the property was brought to sale under a decree of foreclosure. The property was bid in by Mr. Maples, as a trustee for all of the lienholders excepting the lessors. The claim of the lessors that had then accrued for taxes and assessments, etc., was paid from the proceeds arising from this sale, and \$2,500 of rent then delinquent was paid from the proceeds. The necessary funds to pay the costs and to pay the claims of the lessors, appear to have been raised by these other lienors, perhaps in the proportion of their respective claims; and then and thereafter Mr. Maples held the title to the property thus obtained upon foreclosure, which was, I should say, the leasehold interest, and whatever interest in the building under the foreclosure was held by Mr. Maples as trustee for these various lienors in the proportions of their respective claims on account of labor and materials and on account of the funds advanced to discharge these costs and the claims of the lessors. Subsequently a Mr. Norton succeeded to the title and position of Mr. Maples as trustee. Still later it appears that the plaintiff here, Mr. Lent, undertook to redeem, or reinstate himself, by satisfying the claims of these lienors (or some of them, it does not appear that he acquired the interest of all) by taking from them assignments of their respective claims.

After this foreclosure sale—whether before or after the assignments, that I have mentioned, to Mr. Lent, is not clear, and is perhaps immaterial—an action of forcible entry and detainer was instituted by the lessors against the trustee, then Mr. Jesse S. Norton, to obtain possession of the premises, in consequence of default upon his part in payment of rent that had accrued after this \$2,500 had been paid—rent that had accrued after the foreclosure sale—and also on account of a violation of the liquor laws of the state, which, under the provisions of the statute and of the lease would create a forfeiture. That proceeding having been instituted before a justice of the peace, Mr. Norton, as trustee, began a suit in equity in the court of common pleas of this county to enjoin the lessors from prosecuting the same. In his petition he set forth the lease, and that the building had cost a large amount of money, and conceded the default in the payment of rent, but he appeared to have the notion that the

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lessors should not proceed with their forcible detainer action until they had satisfied the claim which he asserted of seventy per cent. of the value of the building, before they should take possession of the premises, and asked in effect that the lessors might be enjoined from proceeding with their forcible detainer suit until his claim in that respect might be adjusted and satisfied. An answer was filed by the lessors, in which they set forth the defaults. The issues were made up, and the case appears to have been submitted to the court upon the issues thus framed, and the petition of the plaintiff was dismissed generally upon the merits. Thereupon the lessors proceeded with their forcible detainer suit, with the result that it was found by the justice that the trustee, Norton, was in default in both of the respects claimed; that he had violated the liquor laws and the terms of the lease, by permitting the unlawful sale of liquor upon the premises, and he had made default in the payment of rent. Judgment was entered against the defendant, a writ was issued, and the defendant was dispossessed, and the lessors went into possession of the premises.

These various suits and proceedings were all instituted within a few years after this lease was executed—the foreclosure suit I think in 1876, the forcible entry and detainer proceeding and the suit in equity following upon that within a year or two after—and they were all determined by the year 1880, and the lessors went into possession in 1881, and they, by themselves and their tenants, to whom they subsequently let the premises, have remained in possession ever since.

In 1881 the trustee served notice upon the lessors that he had selected an appraiser as provided for in the lease, and desired to have them select one on their part, that these two might select a third, to proceed to appraise the premises, in order that the amount of seventy per cent. of the value might be determined. Nothing was done by the lessors in pursuance of that notice. Again in 1891 a like notice was served upon the lessors for like appraisement, with a like purpose, and this was ignored. Thereupon this suit was instituted.

The plaintiff says in his petition that this building cost in the neighborhood of \$18,000; that the amount of taxes and assess-

ments and other claims against him on account of his defaults are much less than the seventy per cent. of the value of the building, which would be something over \$12,600; that therefore, after taking into account all lawful claims of the lessors (the defendants) against him, there would be, perhaps, \$10,000 due him which he ought to have, and which he seeks to recover on account of the value of the building.

The defendants aver and contend, first, that this whole matter is *res judicata*; that by reason of the facts having been set forth in the petition to enjoin them from proceeding with the forcible detainer suit, by reason of the court having given consideration to the evidence therein offered, and having dismissed the case without any saving clause, but generally, the whole matter has necessarily been determined adversely to the claims of the plaintiff. And the defendants further insist that when the trustee (into the rights of the beneficiaries of whom Mr. Lent has come), forfeited his rights under the lease by permitting the unlawful sale of liquor, and by the non-payment of rent, and in consequence was subjected to the judgment in forcible detainer, he thereby forfeited and lost as well any claim which he might have had for the improvements put upon the premises.

As to his first claim of *res judicata*, our understanding of the purpose of that action is, considering the averments and the prayer of the petition, that it was simply to enjoin the plaintiffs in the forcible detainer suit (the lessors), from proceeding therein, and to require them to go into a court of equity to have all claims adjudicated, before they should seek by forcible detainer to recover possession of the premises. And our understanding of the result of the judgment in that suit in equity is, that it determined simply and solely that the lessors had a right to and might proceed with their forcible detainer proceeding, notwithstanding any claims that the trustee might have by virtue of the provision as to the building and compensation therefor. We can not see that the court in that action was required to proceed further with the inquiry or that the court was authorized to go further with the judgment. It seems to us clear, even though the plaintiff in that equity suit might have a right to require an accounting, either then or at some time in

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the future, for the value of the building, that that could not defeat or affect the right of the lessors to proceed by forcible detainer to recover possession of the premises; that the lessors, as a condition to obtaining possession of the premises, were not required to settle for the building, but that under and in pursuance of the terms of this lease, upon default in payment of the rental and on account of the violation of the liquor laws, the lessors at once had a right which they might at once enforce, to recover possession of the premises, and that this right was wholly independent of any right or claim which the trustee or Mr. Lent, as his successor in interest, might have under the provisions of the lease as to the building and as to compensation for the building.

And we are also of the opinion that the court might and should have disregarded the claim of the plaintiff for relief in that equity suit, or rather denied it on the ground that his right of action for the recovery of anything on account of the building had not accrued or matured. While it is true that the lease provides that the right to recover, or to have this seventy per cent. of the value of the building, shall accrue at the expiration of the term, and technically the term expired when default was made, and there was a forfeiture, yet we think the word "term" in this connection should be read in the light of all the provisions of the lease as "time," and that it refers to the time provided by the lease for the lessee's term to expire in the event that there was no default, which would be July 1, 1890; that the person in default, to-wit, the lessee, could not take advantage of his own default, and thereby cause the time for the payment of this seventy per cent. to arise earlier than that contemplated by the parties; that the right of the lessee whatever he had, under this provision, would not accrue until the expiration of the time limited, *i. e.*, July 1, 1890; that the time not having arrived at the time this suit in equity was instituted, the court might very well have dismissed the petition upon that ground; and for that reason it must be assumed, we think, that the court did proceed upon that ground and for that reason.

I desire to refer to one or two cases upon the subject of *res judicata* that we consider in point here. One case is that of *Cramer v. Moore*, 36 Ohio St., 347. The syllabus reads:

“In an action on a promissory note, the maker is not estopped from setting up want of consideration or fraud, by a judgment dismissing his petition on the merits, in an action brought to enjoin the negotiation of the note and to obtain its surrender and cancellation, although the matter set up as a defense was relied on as the ground of relief in the petition.”

What is there decided may not be entirely clear without reading somewhat more of the decision:

“The action in the court below was brought by Moore against Cramer, upon four negotiable notes given by Cramer to Allen and Hopkins March 13, 1868, and shortly after, and before due, endorsed to Moore. Cramer answered that the notes were obtained by fraud for a worthless patent right, and that Moore was aware of the fraud, and took the notes to aid in its consummation; that at the time he took them an injunction existed, allowed on a petition praying that the payees be restrained from negotiating them, and as a final relief, their delivery up and cancellation. To this Moore replied, denying all fraud, either of the payee or himself, and averring that he took the notes ‘in the usual course of trade for a valuable consideration without any knowledge on his part of any infirmity in the notes.’

“He further insists that Cramer is conclusively estopped from setting up or proving any of the facts stated in his answer in relation to fraud in obtaining the notes, he having stated substantially the same facts in his action for the injunction, which, upon being prosecuted to final hearing in the district court, was dismissed upon the merits.

“On the trial the court ruled out the record of that suit, holding that it constituted no bar to the defense of Cramer.

“The trial resulted in a verdict and judgment for the defendant.

“On error, the district court reversed the judgment, on the ground that the judgment in the action prosecuted by Cramer for an injunction was a bar to his making the defense in the action on the notes.

“The object of the present petition is to obtain the reversal of the judgment of the district court.”

Judge White, in the opinion, says, page 348:

“The original action was brought by Moore, the indorsee of the notes, against Cramer, the maker, to recover the amounts due thereon; and the question is, whether Cramer is estopped from proving that the notes were without consideration, and were obtained from him by the payees through fraud.

“On behalf of Moore, it is alleged that Cramer is thus estopped from making defense to the notes. The ground of the alleged estoppel is, that Cramer, after the delivery of the notes to the payees, brought suit against them to enjoin the negotiation of the notes, and to obtain a decree or judgment for their surrender and cancellation; that the grounds of such relief were the same, in substance, as he now sets up as a defense to the suit on the notes; and that, after the allowance of a provisional injunction, the case was finally heard upon the merits and dismissed.”

The facts in this case from which I am quoting resemble in a general way those here; that is to say, so far as this property is involved, it is conceded here that the facts set forth in the petition in equity to enjoin the lessors from proceeding with the forcible detainer suit were the same practically as those set forth in the petition in the case at bar, as grounds for relief. It is urged that because the equity suit was dismissed generally upon the merits, therefore it is a bar to further proceedings here. To be sure these are both actions in equity; whereas, one of the actions mentioned by the court in this case was an action at law and another an action in equity; but we do not think from the discussion of the case, that that could make any difference, since the proceeding in equity was practically to interpose a defense to an action at law, to prevent its going forward.

Judge White proceeds:

“We do not question the principle insisted upon on behalf of the defendant in error, Moore, that a judgment of a court of competent jurisdiction, upon a question necessarily involved in a suit, is conclusive in a subsequent suit between the same parties, depending on the same question; and in respect to this quality of conclusive effect upon parties and privies, the decrees of courts of equity, upon matters within their jurisdiction, stand upon the same footing with judgments at law.

“But in determining the application of this principle to the present case, regard must be had to the nature of the equitable jurisdiction called into exercise in dismissing the petition seeking the surrender and cancellation of the notes in question.

“The foundation of equitable jurisdiction is the inadequacy of the common law to afford the necessary relief. Hence, there is a marked distinction between cases where equity interferes with the remedies afforded to parties by the course of the common law, and cases where equity refuses to interfere.

"If in the present instance, the court instead of refusing to interfere and dismissing the petition, had found the then plaintiff, Cramer, entitled to the equitable relief sought, and had decreed the surrender and cancellation of the notes, the legal right of the payees to sue on the notes would have been extinguished; or if, in violation of the injunction, the payees had put it out of their power to surrender the notes, the court could, doubtless, have followed them into the hands of any party taking them in known violation of the injunction. But such was not the finding and decree of the court. And the findings of fact in the case were only material as laying the foundation for the judgment or decree that was, in fact, rendered. * * *

"The only effect, therefore, in our opinion, of the dismissal of the petition, was to declare that the plaintiff had no equitable right to maintain the action; and that the rights of the parties remained the same as if no action had been brought, or injunction allowed, save only that the dismissal was a bar to the bringing of another action for the same matter."

In *Porter v. Wagner*, 36 Ohio St., 471, I read the syllabus only:

"A judgment of dismissal of a petition for the specific performance of an agreement and of a counter-claim asking a rescission of the same, is no bar to an action for the recovery of money paid on the agreement, although the cause of action accrued before the rendition of the judgment.

"Where a judgment between the parties is relied upon as an estoppel, the question is not what the court might have decided in the former action, but what it did in fact decide, as shown by the judgment.

"A judgment is conclusive by way of estoppel only as to facts, without the proof of the admission of which it could not have been rendered."

I refer, without reading further than the syllabus, to the case of *Witte v. Lockwood*, 39 Ohio St., 141:

"The general rule is that a defendant is bound to set up every defense, legal or equitable or both, which he may have to the action, and waives those not pleaded; but where the facts claimed to afford a defense are sufficient to constitute a counter-claim, there is an exception to such general rule.

"A defendant relying solely on his legal title, in an action to recover the possession of real property, and failing, is not estopped to maintain an action to correct mistakes in the deeds

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under which the parties to such action respectively claimed. He has his election to rely on such equitable title as a defense or a counter-claim, or he may maintain an action thereon."

A word as to the other contention, that by the forfeiture of the term, the lessor and those claiming under him forfeit a right to the appraisal of seventy per cent. of the value of the building provided for in the lease. Counsel for defendant insists that these various covenants upon the part of the lessors and the lessee in this case are dependent; that the performance of one on the one part, or the performance of all upon the one part, constitutes a condition precedent to the enforcement of any of the covenants of the party of the other part. But we can not agree with this contention. The rules for determining whether covenants are independent or dependent are very numerous, and some of them appear to be very technical; but there are certain general rules and principles well stated in 2 Parsons on Contracts (6th Ed.), star paging 528:

"It is a similar question—sometimes indeed the very same question—whether covenants are mutual, in such sense that each is as a condition precedent to the other. And also whether covenants or agreements be dependent, or independent. By the very definition of them, if they are dependent, that is, if each depends on the other, the failure of one destroys and annuls the other. Or, if this dependence is not mutual, but one of them rests upon the other by a dependence which is not equally shared by the other, if that contract upon which this dependence rests is broken and defeated, the other by reason of its dependence is annulled and destroyed also. But they may be wholly independent, although relating to the same object, and made by the same parties, and included in the same instrument. In that case they are two separate contracts. Each party must then perform what he undertakes, without reference to the discharge of his obligation by the other party. And each party may have his action against the other for the non-performance of his agreement, whether he has performed his own or not. Now the law has no preference for one kind of contract over another; nor does it, by its own implication and intendment, make one rather than the other, and still less does it require one rather than the other. It may indeed be safely said that this question in each particular case will be determined by inferring, with as much certainty as the case permits, the mean-

ing and purpose of the parties, from a rational interpretation of the whole contract."

This is in a measure adopted and approved, and a decision made illustrative of the principle, in the case of *Gould v. Brown*, 6 Ohio St., 538. In the course of the opinion, by Brinkerhoff, J., he refers to a rule upon the subject laid down by Sergeant Williams in his note to *Portage v. Cole*, 1 Wms. Saund., 319:

"Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant, on the part of the defendant, without averring performance, in the declaration."

It is contended here on the part of the defendant that it devolves upon the plaintiff to make a tender at first of all the rent that accrued during the fifteen years of the term; that all that had not been paid by him during this foreclosure sale, and the taxes and assessments, etc., he obligated himself to pay, and that this must be done as a condition precedent to enforcing this provision as to the payment for the building, and, as counsel says, as a condition precedent to the opening up of this forfeiture. We do not regard this action as in the nature of a suit to open up a forfeiture. We agree with the contention of counsel, that the forfeiture, on account of the violation of the liquor laws, is not subject to being set aside by a court of equity—that it is absolute; that by the forfeiture the term was ended; that the right of Lent and of the trustee succeeding him, to the term, and to occupy as lessee, was absolutely at an end after the judgment in the forcible detainer suit and the taking possession by the lessors; and that there could be no relief against that forfeiture. We are of the opinion that it follows, too, that the right of the lessors to recover rent for the remainder of the term ended as well. But it does not follow that the right of the lessors for compensation as damages in consequence of this default was at an end; and we are of the opinion that in the adjustments of the rights of the parties, they may require the plaintiff to account to them and compensate them for any damage resulting therefrom. We will not undertake at this time

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to lay down any rule of damages; that will remain for further consideration; but it may be said generally that it would be the loss resulting from the failure of the lessee to comply with the terms of the lease, to remain in possession and pay the rent. It may be readily seen that if the lessors were not able to rent the premises for the remainder of the period of fifteen years at as great advantage as was provided by the terms of the lease, there would be a difference on account of which they would have a claim for damages.

But forfeitures are not favored in law nor by courts of equity. The terms or provisions of the forfeiture will not be extended, nor will they be implied. The forfeiture will not be enforced beyond its strict terms. Now, the parties in drawing this instrument expressly stipulated for the result that should follow from a default, and they did not herein provide that one of the results should be the loss of the building or the loss of seventy per cent. interest in the building. The provision I have already read, that in case of default in the payment of rent, or in permitting the unlawful sale of liquor, or in the payment of taxes and assessments, etc., or of failure "to perform any of the covenants and conditions on his part to be performed, it shall and may be lawful for said party of the first part to re-enter and take possession of said demised premises, and expel said party of the second part, his heirs, executors or assigns, therefrom." The defendant here had a right to terminate the lease, he had a right to put an end to the term; but the provision as to the compensation for the building, according to our construction of this instrument, stands as an independent matter. There is no provision that the right to recover this seventy per cent. should be lost by any default upon the part of the lessee. We do not look upon it as being like a case where a lessee for his own convenience erects buildings, or improves, or puts in fixtures that he may not be permitted to take away or remove after the expiration of the term, there being no express provision in the lease upon the subject. But here we have a provision which discloses that the removal of the building to be erected by the lessee was not contemplated; he had no right to remove the building in any event, even though he had performed and completed

every covenant upon his part to be kept and performed. The building was to remain, and it was to be purchased at the expiration of the time, as we read the lease, by the lessors. He obligates himself to purchase it, and to pay just seventy per cent. of its value, to be ascertained in the mode pointed out. The lessor had a right to take possession of the premises, as I have said. He regained possession by the action of forcible detainer. Having regained possession, he had a right to the use and occupation of the building, and the lessee had no right to interfere with him in the exercise of that right or in that possession. The lessee, by reason of his default, was bound to remain out of possession, and to wait quietly until the expiration of the period of fifteen years. He had no remedy until that period had expired, then we think his remedy was that which he seeks to pursue here, to ask that the appraisement should be made, and if the seventy per cent. of the value of the building at that time was more than the damages accruing to the lessor in consequence of his default, the lessee would be entitled to the difference; if it was less, he would be entitled to nothing; he would be required to pay to the lessor the damages in excess of the value of the building.

It seems to us that the parties would hardly have entered into a contract of this kind with any other result in contemplation. We do not think the result should be that insisted upon by counsel for the defendant here, that the lessee, after putting up a building worth \$18,000 upon this vacant lot, adding that much to its value, if he made default in the payment of a single installment of perhaps \$50 of rent or less, by virtue of the forfeiture resulting from that slight default, should lose his building worth \$18,000. We would not feel warranted in taking that view of the contract, unless by its express terms we were required to do so. We think that was not in contemplation, and is not the meaning of the contract, and our conclusion is, that the accounting prayed for should be made.

It is said that the plaintiff is insolvent, while the defendant is solvent, and it is insisted upon behalf of the defendant that the balance, if there is to be a balance struck, would be in defendant's favor, and that it is a great hardship to require him to

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enter upon this litigation and to submit to this accounting, when the result will be to show a balance in his favor. We know of no rule under which we can deny the plaintiff the relief he seeks simply because he is insolvent and any judgment in favor of the defendant would be worthless. We have thought about the matter of requiring security for costs, but we know of no authority permitting us to do that. If a referee should refuse to serve because of plaintiff's financial condition, we know of no reason why the plaintiff may not make known his inability, and insist on the court sitting here and listening to all the testimony.

I omitted to state that this is the opinion of a majority of the court; the court is not unanimous.

Mr. Thurstin: "I would suggest that there would be difficulty in working out this judgment which the court has rendered, and perhaps the court can aid us in respect to that. Long before the term had expired—that is, the term of fifteen years—the owner of this property had found it necessary, in order to make it available at all, to reconstruct the building, and it was reconstructed for the purpose of getting a tenant. While the court has said that the value of the building for business purposes at the end of fifteen years at seventy per cent. was to be taken, of course it would be grossly unfair to leave out the improvements which he was compelled to make upon it in order to make it available at all."

Parker, J.: "We have considered that the value of the building, as originally constructed by the plaintiff, subject to reasonable wear and tear, is to be the basis. The plaintiff would not be entitled to any improvements put upon it subsequently by the lessors to make it available for their purposes."

HAYNES, P. J.:

I simply occupy this position in this case at present: I neither assent nor dissent; but inasmuch as a majority of the court are of the opinion that the case should go forward, I thought they should deliver the opinion, and as the case progresses I will look into it further. I am inclined to the view at

the present time that the plaintiff has no equity, but I do not want to conclude myself one way or the other upon that question at the present time.

Hamilton & Kirby and J. S. Wirtman, for plaintiff.

W. S. Thurstin, for defendant.

ARBITRATION.

[Circuit Court of Stark County.]

DANIEL F. MOCK V. NEWTON K. BOWMAN.

Decided, February Term, 1902.

Statutory and Common Law Arbitration—The Award—May be Excepted to and Set Aside, How—No Appeal from an Overruling of the Exceptions to the Award—Where Real Estate is Involved, but the Title Passes to a Designated Person Under the Arbitration Agreement—Arbitration is Not Barred by the Statute—Previous Joining of Issue in Court Without Effect.

1. The fact that the parties to an agreement for an arbitration had previously joined issued by pleadings in court, does not affect their right to submit their controversy to arbitration.
2. An arbitration is statutory, and not under the common law, where the agreement to arbitrate fixes the time and place of trial, names the arbitrators, provides that the result arrived at by a majority of the arbitrators may be made a rule of court, and that the parties shall enter into bonds for the faithful carrying out of the award, and the title to real estate is not involved.
3. The provision in Section 5601, which excepts from arbitration controversies involving the title or possession of real estate, is not violated where real estate forms a part of the property subject to arbitration, if it is designated in the agreement to arbitrate to whom the said real estate shall pass.
4. An appeal to the circuit court does not lie from the overruling of exceptions to the award in the common pleas court and the entering of judgment thereon.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

Appeal from Court of Common Pleas of Stark County.

This suit was originally commenced in the court of common pleas for the purpose of settling a partnership, or for the disso-

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lution of an existing partnership, and for the settlement of the matters in dispute between the parties. Issues were joined by proper pleadings in the common pleas court. After issues were joined the parties, by agreement in writing, agreed to submit their questions in dispute to three persons named in the articles of agreement for their determination. The terms of the agreement were in substance as follows:

That there was this suit pending in the common pleas court of this, Stark county, for the purpose of winding up the affairs of the late firm of N. K. Bowman & Co.; that the parties to adjust their differences entered into the agreement to arbitrate; that the arbitration was to embrace all questions and matters of difference, except as therein modified, which differences were to be submitted by the parties to the arbitration, determination and award of three persons named therein as arbitrators, who were to hear and determine the same at North Lawrence, Stark county, Ohio, beginning January 22, 1901, at 9 o'clock A. M., with the right to adjourn, and to make their award in writing on or before March 22, 1901; and when so made, said award was to be final, binding and conclusive upon the parties and shall be made a rule of the court of common pleas of Stark county, Ohio.

Said arbitrators were to make a complete inventory and appraisalment of all property, real and personal, belonging to the firm, whether in the name of the firm or the individual name of the parties. They were to make a schedule of all liabilities of the firm, hear and determine all matters in dispute, accounts and dealings between the parties, and between said N. K. Bowman & Co., and either of the parties thereto, and state the account between them. They were to deduct from the assets all the liabilities, and determine the interest in the balance of the assets belonging to each of the parties.

It was further stipulated that the defendant Bowman should take, and be obligated himself to take, the real estate belonging to the firm located at North Lawrence, and all merchandise and machinery belonging to the firm; also all book accounts, credits and bills receivable belonging to the firm at the value placed upon the same by the arbitrators. The arbitrators were to determine which of the parties should take the real estate belonging

to the firm located in the city of Massillon, and the party taking the same under the award was to take it at the value placed thereon by the arbitrators. The said Bowman should pay any and all liabilities of the firm above referred to within six months from the date of the agreement, and he agreed to save Mock harmless from any liability thereon. If it should develop that there were any liabilities other than those contained in the schedule above provided for, then the same should be paid by Bowman, provided they are admitted by both parties to be *bona fide* indebtedness of the parties. If the parties could not so agree, and the matters are litigated, then said Bowman should pay the amount determined by said litigation, and said Mock agreed to reimburse Bowman for one-fourth of said liabilities together with one-fourth of the legitimate expenses incident to the litigation and adjustment of said liabilities. If it should develop that there are debts contracted for and incurred for the sole benefit of either of the parties and not for the benefit of the firm, the party so contracting and incurring the same should be charged with the amount thereof. If in the making of the award provided for it should be found there was any balance due from either party to the other, it was agreed that the one so found to be indebted to the other, should pay to such other said amount, or secure the payment thereof to the satisfaction of the parties to whom the same should be due, within thirty days from the date of said award.

It was further agreed that said Mock, upon the making of said award, should execute and deliver to Bowman a quit-claim deed for the North Lawrence real estate; that whichever party shall be required will execute and deliver a quit-claim deed for the Massillon property to the party awarded the same.

It was agreed that the wives of the respective parties should join their husbands in the execution of any deed necessary to carry out the provisions of the contract; that the parties should execute to the other a bond, with securities to be approved by John Eschliman, J. P., in the sum of \$2,000, conditioned upon the faithful compliance with and performance of the agreement, and of carrying out and abiding by the award that shall be made by the arbitrators; and conditioned further upon the payment

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of any loss or expense attended upon the failure of either party to abide the terms of the award or agreement; that the arbitrators should determine the question as to how the costs and expenses of the proceeding shall be paid; that should the arbitrators be unable to agree unanimously upon any matters provided to be submitted to them, then the opinion of any two of them should prevail; that the articles of agreement should be in force and binding from the signing of the same, and the execution and delivery of the bonds therein provided for, and at said date said agreement shall be made a rule of the court of common pleas as therein set forth.

These are substantially the terms of the agreement entered into between these parties. In pursuance of the agreement the cause proceeded to a hearing before the designated arbitrators, as therein provided for, and a result was reached by them and filed, as contemplated, in the court of common pleas.

After the award was so returned, exceptions were filed thereto by defendant Bowman. The exceptions, among other grounds, contained the statutory grounds under Section 5611, Revised Statutes:

1. That the award appears on its face to be erroneous.
2. That the award was obtained by fraud.

The exceptions were heard in the common pleas court, and overruled, and judgment was entered upon the award in said court. To the finding of the court, in overruling the exceptions, and entering judgment, the defendant appealed to the circuit court. A motion is made to dismiss the appeal on the ground that the case is not appealable, and, therefore, this court has no jurisdiction over the subject matter or the parties. This is the only question before us for determination.

The suit being one for the settlement of partnership matters, or in other words an equitable action, neither party was entitled to trial by jury.

The differences and disputes between the parties were made up by pleadings in the court of common pleas; and at that stage of the proceedings the parties entered into an agreement to arbitrate, the substance of which has been given.

The first question that is presented is, whether the agreement to arbitrate is one under the statute providing for arbitration—title 1, division 7, chapter 2, Revised Statutes of Ohio, and being Sections 5601 to 5613 inclusive; or it is merely a common law arbitration.

It is to be observed that the agreement contemplates and fixes the time and place of trial, the arbitrators are named, the result that they or a majority of them arrive at is to be made a rule of court, and the time for the commencement and the ending of the investigation are fixed by the agreement or contract; that the parties shall give to each other a bond for the faithful carrying out of the award that might be rendered in the cause.

With these terms, conditions and provisions in the contract, is the arbitration one under the statute, or is it an arbitration at common law?

There is one further element or feature that should be noticed reflecting on the question as to its being a statutory arbitration or otherwise.

Section 1 of the statute providing for arbitration, Section 5601, Revised Statutes, provides that "all persons who have any controversy, except when the possession or title of real estate may come in question, may submit such controversy to the arbitrament or umpirage of any person or persons, to be mutually agreed upon by the parties, and they may make such submission a rule of any court of record in the state."

If the possession or title to real estate is in controversy between the parties, these questions can not be submitted to arbitration, being excepted in the statute.

Is the possession or the title to real estate in controversy between these parties? It is agreed between them that the North Lawrence property is to be taken by defendant Bowman. No question about its possession or title is involved. There is real estate also in the city of Massillon, but there is no dispute or controversy about the possession or title of this property; who is to take it is to be determined by the arbitrators. The submission, therefore, is not one involving the possession or title of real estate, and not in violation of Section 5601, Revised Statutes

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It is contended by counsel for defendant Bowman, that as the parties had joined issue by pleadings in the court of common pleas this fact affects the question as to their right to arbitrate or submit their controversies to arbitration. If disputes exist between parties it can make no difference whether their differences are made up by pleadings, or whether there are no pleadings, so far as their right to submit their differences to arbitration is concerned. If they give bond as contemplated by the statute, by naming the arbitrators therein, such difference may be submitted to arbitration.

Our conclusion is that the fact issues were made up by pleadings in the common pleas court furnishes no objection or reason why the parties could not legally submit their disputes to arbitration under the statute.

The statute is broad in its provisions. All persons who have any controversy, except as to the possession or title to real estate, may submit to arbitration, and agree that it should be made a rule of court in any court of record in the state. see

We hold, therefore, that because this is an equitable action and the issues were joined by pleadings, these facts do not destroy or take away the right to arbitrate under the statute. And although real estate is a part of the assets of the contending parties, yet as neither the possession or title to the real estate is in dispute, arbitration may be had.

The bonds executed by the respective parties under the agreement contain the name of the arbitrators and are in conformity to the provisions of Section 5602, Revised Statutes. The agreement further provided that a majority of the arbitrators in fixing the award should be sufficient. This could not be the case if the arbitration were a common law arbitration; but under the statute, Section 5607, Revised Statutes, a majority is sufficient.

Our conclusion is that the arbitration or submission under the agreement in this case substantially complies with the statute, and, therefore, is a statutory arbitration. The statute of arbitration is a remedial statute, and being of that nature it is to be liberally construed (*Springfield v. Walker*, 42 Ohio St., 543). The submission being one under the statute, and the award hav-

ing been returned to the common pleas court, how if at all can the award be attacked?

Section 5611, Revised Statutes, provides that the award may be attacked: 1. When it appears on its face to be erroneous. 2. When it was obtained by fraud.

Exceptions were taken to the award by defendant on these as well as other grounds. The exceptions were all overruled and judgment was entered on the award. From this judgment the defendant appeals to the circuit court.

Does an appeal lie in such a case? This is the important question for our determination. "Where an award of arbitrators is filed in the court of common pleas, exceptions thereto overruled, and judgment upon the award, under Sections 5608, 5612, Revised Statutes, the case is not appealable to the district court under Section 5226, Revised Statutes" (*Moore v. Boyer*, 42 Ohio St., 312). We think this case is decisive of the questions we have here.

Arbitrators are constituted by the parties, under a statutory submission, chancellors, judges and jurors, having jurisdiction of the law and facts. *Ormsby v. Bakewell*, 7 Ohio (pt. 1), 98, 99, 113; *Moore v. Boyer*, *supra*.

Where jurisdiction is conferred by statute, as in this case, in matters submitted to arbitration, and no method is prescribed for bringing a case before an appellate court, the court is powerless to prescribe any method by rules and regulations either in matter of appeal or matters of error. It has been held by many authorities that conferring jurisdiction upon an appellate court, without prescribing any mode of bringing the action into the court, is in effect denying the jurisdiction of the court. *State v. Hanousek*, 19 C. C., 303; *Springfield v. Walker*, 42 Ohio St., 543.

The statute regulating trials by arbitration makes no provision for bringing a case into the circuit court by appeal, but does prescribe a remedy and the only one by attacking the award—that it is erroneous, or was obtained by fraud, collusion or misbehavior of the arbitrators; but if these grounds are overruled by the court to which the award is returned, the only way to review the holdings of the court, if at all, would be by proceed-

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ings in error. Whether error will lie in such case is not before us, and we do not decide that question.

We hold that the case is not appealable, and the motion to dismiss the appeal is sustained.

Atlee Pomerene, for motion.

Sterling & Brancher, for defendant.

THE COVERING OF REVOLVING SHAFTING, WHEELS, Etc.

[Circuit Court of Lucas County.]

GEORGE W. CROSSMAN v. P. & T. DEGNAN SAND, DREDGING &
LIGHTERAGE CO.

Decided, March 7, 1903.

94 O. L., 42—*Providing for the Boxing of Revolving Shafting, Wheels, Etc.—Not Applicable to the Reciprocating Parts of an Engine—Contributory Negligence of a Fireman.*

1. The statutory requirement that guards or casings be placed over revolving shafting, etc., and providing that keys, bolts and set screws projecting unevenly from revolving wheels shall be enclosed, does not include the reciprocating parts of a steam engine.
2. One employed about an engine, who falls among the moving rods while attempting to perform a duty not required or expected of him while the machinery is in motion, is guilty of such contributory negligence as will prevent his recovery for the injuries received.

HAYNES, J.; PARKER, J., and HULL, J., concur.

Heard on error.

This is an action brought by Crossman to recover for damages which he suffered in the employ of the defendant in a machine that they were operating on the dock, which was used for the purpose of unloading sand. Upon the trial the case was taken from the jury and a verdict directed for the defendant.

The plaintiff was an employe of the defendant as a laborer. The defendant was engaged in unloading sand from a scow it had at docks near Water street, in the city of Toledo. It used for that purpose a Macmillan machine for unloading the sand.

This consisted of a rotary wheel, communicating with the boat by a chain, an engine and boiler—two engines, I think—connected with machinery outside, and was used for the purpose of taking the sand from the vessel to the dock. On the evening of the day of the injury, about the time the plaintiff was leaving for home, Degnan said to him, or asked him, if he wouldn't go over to the building and help operate the machine, as the fireman wanted to go away. They had a load of sand which had to be unloaded by ten o'clock that evening. The plaintiff consented to go, and did go. He had before worked on that machine, and the engineer says fired before. He asked the plaintiff when he came if he knew about the business, and he said yes, he was well acquainted with it. He went over and was engaged in firing during the evening. His work brought him near the door and not to any other part of the building. He was simply moving coal from a box by the door into the furnace. It was his duty, as alleged in the petition, after the work was done, to close certain windows or openings in the building. There were four of them. They were kept open for the purpose of ventilation, and closed by sliding wooden doors. Instead of waiting until the work was completed and closing these after the work was finished, the plaintiff, when there were some two buckets to be moved from the boat to the dock, started out to close these windows, evidently thinking to have them closed by the time the work was practically done. He went to the other side of the building and stepped upon something to reach up to the door or window. That particular window bound a little, and thereupon he stepped up higher on a ladder, and from there, with one foot at least, attempted to step over on to a shelf that was about five feet above the floor, immediately over some part of the machinery of the engine, and he stepped his foot on some movable substance, and his foot turned a little, and slipped, and he fell down in the machinery, and one of his legs at least went down through to the floor where there was an opening at that time, between the connecting rod and what is called the eccentric rod, and the motion of the machinery injured his leg, and there was a little key on one side of the rods that was counter-sunk into the machinery that cut his knee. They stopped the

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machinery, of course, immediately, and he was taken out. The result was, he brought this suit.

The petition sets out that the defendants failed in a great many respects in the performance of their duty towards this plaintiff: They omitted guards to this machine, and they failed to furnish a reasonably safe place for the plaintiff to work; failed to furnish proper light, and several other matters of that kind that counsel very ingeniously thought that the defendants should have done in this matter in order to protect this plaintiff.

It seems to us very clear that defendants had given him a safe place to work, if he had stayed where he belonged and continued to work until the machinery was stopped, and after it was stopped, to have then proceeded to perform the duty that was incumbent upon him in closing these windows, when in doing so there would have been no danger at all. It is very apparent, it seems to us, that this man received this injury through his own negligence and carelessness in going to a place where he ought not to have gone when the machinery was in full operation, and climbed over the machine, and stepped from one point to another, in doing which he received the fall and injury.

The court, however, took the case from the jury on the ground that there was no negligence on the part of the defendant; that the statute which had been invoked by the plaintiff did not apply to the machinery. We have examined this statute and endeavored to ascertain its meaning, and also to ascertain the character of the machinery directly at the point where the plaintiff fell. The statute (94 O. L., 42) requires:

“That owners and operators of * * * all places where machinery of any kind is used or operated, shall take ordinary care, and make such suitable provisions as to prevent injury to persons who may come in contact with any such machinery or any part thereof; and such ordinary care and such suitable provisions shall include the casing or boxing of all shafting when operating horizontally near floors, or when in perpendicular or other position operating between, from, or through floors, or traversing near floors, or when operating near passageway, or directly over the heads of the employees.”

This man was in no way injured, as we understand the operation of this machinery, by any shaft that was in motion at the time. Further it says:

"The enclosure of all exposed cogwheels, flywheels, bandwheels, all main belts transmitting power from engine to dynamo, or other kind of machinery, and all openings through floors, through, or in which such wheels or belts may operate, with substantial railing; the covering, cutting off, or countersinking of keys, bolts, set-screws, and all parts of wheels, shafting, or other revolving machinery, projecting unevenly from and beyond the surface of such revolving parts of such machine."

We are unable to see where that statute in any manner relates to the machinery that was in use at this point. This covering, as we understand it, has reference to a bolt or a set-screw or some other article that projects from a revolving wheel, because, when the wheel is in motion, it might not be seen, and it might very easily catch in the clothing, or something of that kind. But there was nothing of that kind in operation at this point, so that the statute which has been invoked does not cover the case, as we think. It is said we ought to give a very liberal construction to the statute. We are of opinion that no fair and liberal construction of the statute would be of any benefit to this plaintiff in that respect. In short, we fail to see where these defendants have been guilty of any negligence whatever in regard to the work that was being done or the machinery that was being used and operated at that time; that they did all that prudent men would properly and fairly do. This plaintiff was sent there, and near the close of work hurried because he was evidently very anxious to get away, and undertook to do that which should have been done after work was stopped, before it was stopped, and it was through his own act of negligence in doing this that he received his injury. The judgment of the court of common pleas will therefore be affirmed.

It is suggested by Judge Parker that even if there was any nut or set-screw there that might have contributed to this injury, there was nothing in the pleadings that covers that cause of action in any manner or form, and it was not relied upon in the trial of the case as a ground for recovery.

PARKER, J.

There was no reference made to it, and it was not sought to be brought out in any way. It is a little difficult to get at

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exactly what this machinery was, or whether or not the key which fastened the connecting rod to the disk may not have been a key of a piece of machinery that required to be sunk, and as Judge Haynes says, it is not alleged as negligence.

FIRE INSURANCE.

[Circuit Court of Harrison County.]

**CONNECTICUT FIRE INSURANCE CO. v. J. LYLE CLARK, RECEIVER
OF CLARK BROS.**

Decided, May Term, 1902.

Insurance—Books of Account Necessary to be Kept—Under an "Iron Safe Clause" Covering Merchandise in a Country Store—Charge of Court—Error in, Cured by Special Verdict.

1. Where the books of account kept by the proprietor of a country store are such as would fairly show to a man of ordinary intelligence the business transacted, including the stock on hand and the purchases and sales made, the provision known as the "iron safe clause" in a policy of insurance covering the stock is satisfied.
2. An erroneous charge of the court to the jury is not a ground for reversal of the judgment, where it appears from a special verdict that the charge was not prejudicial.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Heard on error.

Defendant in error recovered a judgment in the court of common pleas against plaintiff in error upon a policy of insurance for loss sustained upon a stock of merchandise caused by fire. The principal controversy below, and also in this court, is upon the provision of the policy known as the "iron safe clause," the provision being as follows:

"The insured in this policy hereby covenants and agrees to take an inventory of the stock covered by the policy at least once every twelve months during the life of this policy, and unless such inventory has been taken within one year prior to the date of the issuing of this policy, one shall be taken in detail within thirty days thereafter; and the insured further covenants and

agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales both for cash and credit during the life of the policy; keeping them securely locked in a fire proof safe at night and at times when the store mentioned in this policy is not actually open for business, or in some secure place not exposed to fire which would destroy the building where the business is carried on; and that in case of loss the insured is to produce said books and inventory, and in the event of failure of the insured to produce the same the policy shall be null and void."

It is claimed that the books kept were not such as were required by this provision of the policy. Counsel insist that there must be a strict compliance with the conditions: "That the books must show a complete record of the business transacted," and that the insurance company is entitled to a literal interpretation of the words of the policy.

Policies of insurance should be construed as other written contracts. Reasonable interpretation is all that is required. In *Turley v. Fire Ins. Co.*, 25 Wend., 374, 377, Nelson, C. J., in referring to a condition of a policy of insurance requiring the insured, if damage by fire was sustained, to procure a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire, setting forth certain facts in regard to the fire and the insured, said:

"This clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance as derived from the language used should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form—following words rather than ideas."

In the case of *The Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S., 136 (21 Sup. Ct. Rep., 326), Justice Harlan, in delivering the opinion of the court, says:

"Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case?

"The covenant and agreement 'to keep a set of books showing a complete record of business transacted, including all purchases

and sales, both for cash and credit, together with the last inventory of said business,' should not be construed to mean such books as would be kept by an expert bookkeeper or accountant in a larger business house in a great city. That provision is satisfied if the books kept were such as would fairly show a man of ordinary intelligence all purchases and sales both for cash and credit."

The policy issued to Clark Brothers, as far as the personal property was concerned, was upon a stock of merchandise in a country store situated in a small village. The books kept, it is true, were not very methodical. There was, however, the inventory book, showing the inventory taken within a year; and a book showing all sales, both for cash and upon credit. Some goods were exchanged for produce, but the amount of such exchange and its effect upon the stock purchased could be ascertained with reasonable certainty from the sales book. There was an invoice book. True, the invoices were not all copied in the book, some original invoices being pasted in the book without copying. A large number were not pasted in the book at the time of the fire, but were placed in afterwards, they being kept in the safe. There was no claim that there was any fraud or that any invoices were placed in the book for goods not actually purchaser since the inventory made in January previously.

We, therefore, are of opinion that the books kept were such as would fairly show to a man of ordinary intelligence the business transacted; the stock on hand in January and the purchases and sales, both for cash and credit subsequently made.

The other question made is upon the charge of the court. The court submitted the question to the jury as to whether or not the books kept by Clark Brothers were in accordance with the iron safe clause of the policy, and properly so submitted the question. It was a question of fact to be determined by the jury, under proper instructions of the court as to what would be a compliance with this provision.

The averment of the petition was that plaintiff had duly kept and performed all the conditions of the policy, except as to furnishing proofs of loss, and that that condition had been waived by the insurance company.

In the charge the court, inadvertently no doubt, stated to the jury that it was necessary for the plaintiff to satisfy the jury by a preponderance of the evidence that they had kept the necessary books, and also furnished the necessary proofs of loss, unless they should find the company had waived the same. There being no allegation in the pleadings that the company had waived the keeping of the necessary books under the iron safe clause, and no proof of any waiver, that part of the charge was clearly erroneous and would be fatal to the judgment, provided it was prejudicial.

Special interrogatories were submitted to the jury at the request of defendant below, one of the interrogatories being as follows:

“Were the requirements of the iron safe clause in the policy complied with?”

The jury answered:

“They were.”

The question was direct, specific and certain; not were the provisions complied with or waived, but were the necessary books kept and preserved; and the answer was:

“They were.”

The error of the court in the charge could, therefore, have had no effect upon the jury, and plaintiff in error was in no manner prejudiced.

In the case of *Chase v. Brundage*, 58 Ohio St., 517, the court held:

“It is the province of the jury and not of the court, to determine whether there was such agreement, which must be done from all the evidence; but error in the failure to submit that question to the jury by the general charge of the court or refusal to charge, is cured, where it is submitted at the request of a party by interrogatories calling for a special finding of the fact, and is determined by such special finding returned by the jury, consistent with the general verdict.”

On page 526, Williams, J., says:

“The special findings are consistent with the general verdict, and cured the error in the general charge of the court, and in

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its refusal of the instruction requested. They find the essential facts which fix the legal rights of the parties, and cover the questions that the plaintiff desired to have submitted to the jury by the instructions which were refused."

Applying the same principle to this case the error was not prejudicial. The judgment will be affirmed.

Mooney & McCoy, for plaintiff in error.

Hollingsworth & Cunningham, for defendant in error.

BILL OF EXCEPTIONS.

[Circuit Court of Sandusky County.]

FRANK A. KNAPP, TRUSTEE, v. BARBARA SCHERCK.

Decided, 1903.

The Terms "Testimony" and "Evidence" Not Equivalent—Bill of Exceptions Must Contain All the "Evidence" to Secure a Review of the Case on the Weight of the Evidence.

The word "testimony" can not be accepted as synonymous with "evidence" in the recital that a bill of exceptions contains all the evidence submitted in the case; and where it appears that documentary matter of any kind was offered at the trial below, a reviewing court will decline to hear the case if it does not affirmatively appear from the bill of exceptions that all the "evidence" is included which was submitted at the hearing below.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This is a proceeding brought to obtain a reversal of an order of the court of common pleas, refusing to discharge an attachment. It is contended that upon the evidence submitted to the court below, it should have discharged the attachment, and that it erred in not doing so.

To present that question, of course, it is necessary for the plaintiff in error to bring up the evidence by a bill of exceptions, and that he has attempted to do.

It is contended by defendant in error that the bill of exceptions does not show that it contains all of the evidence submitted upon the hearing of the motion to discharge the attachment.

The bill of exceptions, after setting forth various affidavits and testimony in other forms which was submitted, contains the following statements:

“And thereupon the defendant rested. The foregoing is all of the testimony that was offered by either party to said action to discharge said attachment.”

It is the law generally, throughout the Union, and is settled in this state by a long line of decisions, beginning as far back as *Hurley v. State*, 6 Ohio, 399, that where a court of error is asked to set aside an order or judgment of a lower court, upon the ground that it is not sustained by sufficient evidence, or is against the weight of the evidence, the bill of exceptions must set forth affirmatively that it contains all the evidence submitted to the lower court. This must appear expressly, and it must appear from the bill of exceptions. It can not be made to appear otherwise, and therefore the reviewing court is not at liberty to regard statements of counsel or other extraneous evidence, that the bill of exceptions in truth contains all of the evidence submitted to the lower court.

The question presented here is whether a statement that the bill of exceptions contains all the testimony submitted is equivalent to a statement that it contains all the evidence submitted.

Our code does not distinctly define the terms “evidence” and “testimony,” and yet there is some language in the code that we think throws a side light upon the question.

Section 5305, Revised Statutes, the sixth clause, provides that a new trial may be granted on the ground, “That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.”

There the term “evidence” is used as comprehending every form of evidence, every form of admissible information to a court, and includes testimony as well as documentary evidence, exhibits, which may be of a corporal character, and every other thing which may properly give information to the court upon the issues presented.

Chapter 3, Title 1, Division 3, of the code, dealing with “evidence” has various subdivisions; one on the competency of wit-

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nesses; one on the means of securing attendance; one on the mode of taking testimony and exceptions to depositions; one on the admission and inspection of documents, and one on variances.

In the special division on the mode of taking testimony, we find this in Section 5261, Revised Statutes:

“The testimony of witnesses may be taken.

“1. By affidavit.

“2. By deposition.

“3. By oral examination.”

Section 5262, Revised Statutes, provides that:

“An affidavit is a written declaration under oath made without notice to the adverse party; a deposition is a written declaration under oath, made upon notice to the adverse party; and oral testimony is that delivered from the lips of the witness.”

So that the word “testimony,” by these two sections and other provisions of the statute, is made to include not only the oral statements of witnesses in court, but the statements of witnesses by way of affidavit or deposition.

The fourth subdivision of the chapter treats of the subject of the admission and inspection of documents in a way to indicate that in the minds of the codifiers documentary evidence would not properly come under the description of testimony, and nowhere in the statutes or in the reports do we find such use of the word “testimony” as would include anything but the statements of witnesses either by way of affidavit or deposition or orally.

We are of the opinion that the word “testimony” is a word which does not include documentary evidence, or various forms of evidential matter, such as photographs, etc., which may be introduced as evidence, and which must be made a part of the bill of exceptions, if it is to include all the evidence submitted.

Therefore the statement that the bill of exceptions contains all the testimony submitted, does not necessarily carry with it a statement that it contains all of the evidence submitted.

This bill of exceptions shows that there was oral testimony, and testimony in the form of a deposition, taken upon some

other occasion, but read upon this hearing, and that various affidavits were submitted; that this testimony (for it all comes under the description of "testimony,") was introduced, and was considered by the court, but for aught that appears there may have been a very great deal of other evidence of a very persuasive character, which was considered by the court.

We are not disposed to be technical or to place a hindrance in the way of bringing these cases into this court for review. We have been disposed to be liberal in the consideration and decision of questions presented to us along this line, and yet, in view of the repeated utterances of our Supreme Court upon this question, we do not feel at liberty to hold that a statement that a bill of exceptions contains all the testimony submitted is sufficient.

In *Hall v. Reed*, 17 Ohio, 498, in the syllabus the word "testimony," is used as the equivalent of evidence, but that was at a time when the syllabus was not prepared by the court, and in looking into the opinion we find that the court used the word, "evidence."

In *Pittsburg, Ft. W. & C. Ry. Co. v. Probst*, 30 Ohio St., 104, the court says that a bill of exceptions must show that it contains all the testimony in the case. In that case, the only question was about the omission of certain testimony. While it is true that it must contain all the testimony, it is equally true that, as said in a great many decisions, it must also contain all the evidence, and we find no decision or no utterance of any court that supports the contention that the statement that it contained all the testimony would be sufficient.

In *Miller v. Fuller*, 52 N. E. Rep., 101, decided by appellate court of Indiana, in 1898, a part of the syllabus reads:

"A statement in a bill of exceptions 'that this was all the testimony given in the cause' is defective, 'testimony' and 'evidence' not being synonymous."

And in the opinion the following cases are cited as supporting this holding: *Kleyla v. State*, 13 N. E. Rep., 255; *Harvey v. Smith*, 17 Ind., 272; *Brickley v. Weghorn*, 71 Ind., 497; *Sandford Tool & Fork Co. v. Mullen*, 27 N. E. Rep., 448; *McDonald*

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v. *Elfes*, 61 Ind., 279; *Gazette Printing Co. v. Morss*, 60 Ind., 153; *Ingel v. Scott*, 86 Ind., 518; *Ehrisman v. Scott*, 32 N. E. Rep., 867.

In *Wyoming, L. & Tr. Co. v. Holliday Co.*, 24 Pac. Rep., 193, 194, decided by the Supreme Court of Wyoming in 1890, the syllabus reads in part as follows:

“The sufficiency of the evidence to sustain the finding will not be reviewed on appeal, where the bill of exceptions only purport to contain ‘All the testimony offered by either party.’ ”

And in the opinion this is said:

“Testimony embraces only the declarations of witnesses made under oath or affirmation (Revised Statutes, Wyo., Sections 2609, 2610, Bouvier Law Dict., title ‘Testimony,’) while ‘Evidence, in legal acceptance includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved’ (1 Greenleaf Evidence, Section 1). Testimony is but one of the several instruments of evidence, and can not be considered the equivalent thereof; for evidence embraces not only testimony, but also private writings and public documents.” Abbot’s Law Dict., title “Testimony”; Thompson Trials, Section 2784; *Central Union Telephone Co. v. State*, 12 N. E. Rep., 136.

These cases are in point and sustain the contention of counsel for defendant in error, and the views of this court hereinbefore expressed, and we are cited to and find no authority to the contrary.

Because it does not appear affirmatively in this bill of exceptions that it contains all the evidence submitted upon the hearing, we feel bound to sustain the objection, and we must decline to review the decision of the court below upon the weight of the evidence.

And no error otherwise appearing, the judgment of the court below is affirmed.

**DAMAGES TO ABUTTER FROM IMPROVEMENT OF STREET
TO ESTABLISHED GRADE.**

[Circuit Court of Hamilton County.]

ELIZABETH ROSS v. CITY OF CINCINNATI.*

Decided, December 21, 1902.

Street—Improvement of, to Establish Grade—Grade Found to be Reasonable—Extent of an Abutting Property Owner's Right to Damages—Rights of the Municipality Resulting from a Dedication—Are the Same as from an Appropriation.

1. An abutting property owner has the right to make an improvement with reference to a grade established by ordinance, by improvement, or by user, and if such grade is thereafter changed, he is entitled to damages; but if there has been no grade established by ordinance or user, the property owner is not entitled to damages when a grade is established, unless it is an unreasonable grade.
2. Where land is appropriated for street purposes, whatever damages an abutting owner is entitled to at the time the appropriation is made, by reason of a cut or the taking away of lateral support, must be determined in that action.
3. And where a dedication of the land has been made, the dedication invests the municipality with rights as full as those derived from proceedings in appropriation.

SWING, P. J. (orally); SMITH, J., and GIFFEN, J., concur.

Heard on error.

The case of Ross against the city of Cincinnati is a case in this court on error to the judgment of the court of common pleas. The city of Cincinnati brought an action in the court of common pleas for the purpose of ascertaining the amount of damages which property owners might have by reason of the improvement of an avenue in the western portion of Cincinnati, called Ross avenue.

In that proceeding the plaintiff here, Elizabeth R. Ross, filed her claim for damages by reason of this improvement. The facts are as follows: In 1853 this avenue was dedicated to the city by the plaintiff. Also in 1883 she rededicated it at the time she subdivided her property, I believe, into lots.

* Affirmed by the Supreme Court, without report (67 O. S., 522).

In 1879 the city of Cincinnati passed an ordinance fixing the grade of this street, and this improvement is to be made in accordance with that established grade. No improvement of the avenue had ever been made by anyone; neither the city nor the people owning property abutting upon this avenue had improved it, but it was used as a means of ingress and egress by the people living along it, and the public also used it as far as their necessities required for the purpose of going to and from the premises abutting on it.

Now it is claimed by Mrs. Ross that she is entitled to damages, and she subdivides the loss into three heads, owing to the different location of the property as it abutted upon the avenue.

Near the house abutting on a portion of the avenue, and in front of the house, the improvement contemplated a cut of some four or five feet in front of her premises; west of the house was another tract of land about two hundred feet, I believe, in extent, where it required a fill of some four or five feet, and the improvement as contemplated by the city would place upon her property the burden of maintaining this fill, or a portion of it; therefore the city would require an easement for the support of that earth to make the proper width. Still further west, some two or three hundred feet, the improvement requires a cutting of the ground to the extent or three feet at one end and twelve feet at the other.

The jury found in answer to special interrogatories the damage to the property where the fill was required, two hundred dollars; and they further found that if Mrs. Ross was entitled to any damage by reason of the cut on the western portion of her land that she would be entitled to recover four hundred dollars—that would be the amount of the damage; and I believe a similar amount for the cut in front of her house where the improvement was made.

The city admits its liability for two hundred dollars for the portion of the property where the fill was made.

The jury found that the grade as established by the city was a reasonable grade.

What are the rights of the parties? The court found that Mrs. Ross was entitled to two hundred dollars, but found against her as to the other claims.

It seems to us the law is very well settled in Ohio by a great many decisions of our Supreme Court, and also by other courts of the state, especially this court, and that it is to this effect: That wherever there has been a grade established, either by ordinance or by improvement or user for a long time, that the property owner has a right to make improvements in accordance with the grade as established either by ordinance or by user; but if there has been no established grade, either by ordinance or by user, the property owner is not entitled to any damages unless the grade which the city establishes is an unreasonable grade.

There was no grade established at this place by user or by ordinance except the ordinance of 1879, and these improvements were made in accordance with that grade.

No work had ever been done upon this property, no grade had ever been established, and it could not be said that any improvements made under these conditions would be saved from the general provision that a party making improvements builds with reference to a reasonable grade. So we do not see upon what theory the plaintiff may recover for the improvements that she made on the property when the grade as now fixed is found to be a reasonable grade, and no exception was taken, or no question is made as to that. She was bound to make her improvement with reference to a reasonable grade, which the city subsequently established.

It is claimed that while that may be true, as to the improvements that she made, still Mrs. Ross is entitled to damages by reason of cutting her unimproved property at the western portion where the cut would be from three to twelve feet; that she is entitled to lateral support.

We think that the doctrine of lateral support has no application to facts in this case. Mrs. Ross dedicated this property for a street. She dedicated with that everything that was necessary to make a street in accordance with the reasonable grade that might be established by the city. The dedication would amount to very little if she simply dedicated the surface of the ground, and if the city would be powerless after that dedication to go on and make a street in accordance with a reasonable grade, she would still retain them in her certain rights to that

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street. That is entirely inconsistent, we think, with her dedication. It would be the same if the city had appropriated the property for a street. As we held in the case of *Tenney v. Cincinnati*, whatever damages the party is entitled to at the time of the appropriation by reason of the cut or taking away of lateral support must be determined in that action; and if that can be determined in the action and should be determined at the time the appropriation is made, the dedication by the party would certainly be as full as the appropriation, and if she gave it she could not turn around afterward and sue the city to recover back that which she had already given. And we have found, as I say, that she by her dedication gave so much of that property as was necessary to make a reasonable grade. If the city had gone beyond a reasonable grade, then under the laws of our states she would have her action for that additional right of property that she had not parted with, because under our laws she is only supposed to grant the right to a street of a reasonable grade.

The judgment of the court will therefore be affirmed.

Frederick Hertenstein, for plaintiff in error.

Charles J. Hunt and Frank H. Kunkel, for defendant in error.

STOCKHOLDERS' LIABILITY CAN NOT BE WAIVED.

[Circuit Court of Ashtabula County.]

J. D. KREISSER v. ASHTABULA GAS LIGHT CO. ET AL.

Decided. October 18, 1901.

Corporations—Increase of Capital Stock—Bonds Issued on the Faith of Such Stock—No Effort to Sell the New Stock—Holders of the Old Stock Held Liable—Stockholders' Liability a Matter of Public Policy—And can not be Waived.

1. Stockholders and directors are estopped in any suit to which they are parties from denying the validity of an increase of capital stock, made in conformity with Section 3262, or of an issue of bonds duly authorized by the board of directors on the faith of such increase of stock.

2. Where a certificate as to an issue of new stock was filed, and the proceedings authorizing the issue were in conformity with law, and bonds were put forth on the faith of such issue, but no effort to sell the new stock was ever made, and none of the stock was ever issued except of old stock, it will be presumed that it was the intention of the stockholders and directors to purchase the new stock in amounts proportionate to their holdings of old stock, and they are estopped from denying that they are the holders of the new stock.
3. The provisions found in Section 3 of Article XIII of the Constitution, and in Section 3258, Revised Statutes, relating to the liability of stockholders, are matters of public policy and can not be waived.

LAUBIE, J.; BURROWS, J., and COOK, J., concur.

Heard on appeal.

This case is in this court upon appeal, and there are substantially but two propositions submitted to the court for its determination.

The first question is as to the increase of stock—whether that was a valid increase, so as to bind the stockholders, and if it was, who was to pay for those shares of stock.

The capital stock at that time, in 1888, was \$25,000, and there were but eight stockholders. Whether all these stockholders were directors or not, I am not able to say. Who some of the directors were is shown, but who all of them were does not appear. But in 1888, the time of this increase, there were but eight stockholders, and they met to take such action as was authorized by statute (Section 3262, Revised Statutes) for “the purpose of increasing the capital stock of said company and authorizing a loan.” They made a written waiver as provided by statute as to notice in such cases. Each stockholder voted in the affirmative that the stock should be increased from \$25,000 to \$60,000, to be divided into 1,200 shares of \$50 each, as it had become and was necessary to improve, enlarge, repair and reconstruct its works, plant and establishment, requiring an expenditure of about forty thousand dollars, as recited in the resolution. The resolution further provided that the directors should make, execute and issue eighty coupon bonds of the company, of \$500 each, with a mortgage on all the property then

owned or to be afterwards acquired by the company, to secure said bonds in such form and conditions "as said directors shall deem advisable to properly effectuate and accomplish the object and purposes herein intended." Thereupon the directors met and caused to be executed the bonds and mortgage as directed. The mortgage recited all the resolutions of the stockholders and directors in regard thereto; and that "the capital stock of said gas light company is sixty thousand dollars (\$60,000), divided into 1,200 shares, and of the par value of fifty dollars (\$50) each; and, whereas, under the provisions of said act of May 1, 1852, companies incorporated thereunder are authorized to borrow money, not exceeding the amount of their capital stock, and issuing their notes or coupon or registered bonds therefor."

The bonds were placed upon the market, and a portion of them sold to parties to this case.

There was no provision made in any of the resolutions passed by the stockholders or the directors for the disposal of the additional shares of stock, and no attempt was ever made to sell them. So far as the increase of the capital stock was concerned, that was fully accomplished according to law, the directors having filed the certificate in regard thereto as required by Section 3262, Revised Statutes. If there was any defect in the matter in any form, none of the parties to this suit can now take advantage of it. The parties here are those stockholders, and those of them who were directors, and they are each and all estopped to deny the increase of the capital stock, and they would be fully estopped to deny the validity of the bonds and mortgage.

The provision of the statute (Section 3256, Revised Statutes), authorizing the execution of mortgages to the amount of capital stock of the company, may perhaps be of doubtful construction. At all events, the statute is not definite and does not in express terms provide that bonds and mortgage may only be executed to the extent of the capital stock paid up.

The difficult question in connection with this is whether there were any subscribers to that increased stock—any one who would be responsible as stockholders for its par value, and with the

liability for the debts of the company to the extent of the amount of stock subscribed. We have arrived at the conclusion that it was the intention of the stockholders and the directors that they themselves were to take that stock in proportion to the amount of stock each then held in the company. Having filed the certificate in the proper department, as required by statute (Section 3262, Revised Statutes), in which they certified that the capital had been increased to \$60,000; and having issued the mortgage and bonds aforesaid upon the faith of this increase, and having made no provision for the disposal of such stock, it must be assumed, and they should be estopped to deny, that they themselves intended to take this increased stock.

It seems there was none of this stock issued to any party but one. Henry H. Parsons, who was then one of the prominent stockholders owning fifty shares, and who voted for all the proceedings, and perhaps was a director, died. Some years thereafter his administrator and the heirs turned in his certificate of fifty shares of the original \$25,000 capital stock with the request to issue shares therefor to his heirs, and the president and secretary of the company, who were the same, at least the president was, at the time when this action was taken in regard to increase of stock, issued two certificates for sixty shares each, there being two heirs, one to Mrs. Ford and one to Samuel H. Parsons, and this was their proportion, or would be Henry H. Parsons' proportion of the increased capital stock; and this was done without question on their part; they held the stock and acted upon it, and continue to hold it. Now when we take that into consideration, that this was done without anything being said about it—that the president and secretary of the company of their own motion issued stock in this proportion; that it was accepted without question, and is still held by those parties, and the further fact that no means of any character were taken, adopted, resorted to or mentioned by any stockholder or director for the sale of that stock upon the market, or to put it upon the market, it is fair to assume that it was the understanding and agreement between all of the eight stockholders that they were themselves to take this stock and be responsible for the payment of it. It seems almost impossible that men with the busi-

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ness ability of these stockholders and directors, who were thus engaged in such expensive business, would go through a matter like that without any understanding, agreement or arrangement for the disposition of the stock or its conversion into money; and the only explanation that we can arrive at is, that it was understood among themselves that they were to take such increase, in proportion to the stock which they then held; and the act of the president and secretary in issuing to the heirs of Parsons stock in such proportion was an act from which with the other evidence such understanding may be inferred.

It was not necessary that certificates of stock should have been issued, as an equitable owner of stock is liable as such in all respects the same as if a certificate had been regularly issued to him, which is a mere evidence of his ownership. So the fact that certificates were not issued to any of the stockholders save to the heirs of Henry Parsons, is matter indifferent in the case, when we have arrived at the conclusion that the owners of that stock were on the record as then stockholders, and it was the understanding between them that they should take stock in proportion to the stock they then held.

Substantially all the books of the company are missing; otherwise this presumption might be turned into a certainty.

And this brings us to the second question in this case, whether or not the holders of these bonds were bound by the provision therein that no recourse should be had for their payment to any individual liability of any stockholder; and which provision was inserted by action of the directors. The stockholders had made no provision against their individual liability and made no declaration in that regard, and that provision was inserted by the directors without consulting the stockholders. It may be possible that such stockholders subsequently might take advantage of that provision, growing out of the rule that has been laid down by the Supreme Court of the state, that a contract made upon a valid consideration for the benefit of a third person may be enforced by such person, if nothing stood in the way of their doing so; but we have come to the conclusion, after careful consideration, that the constitutional and statutory provisions as to the liability of stockholders can not be waived by agreement.

That liability is absolute, and the shareholder can not get rid of it by any waiver of, or agreement with his creditors.

We are cited by counsel to a case in the fifth circuit, *Hull v. Coal & Iron Co.*, 20 C. C., 533, holding a contrary doctrine, where the same question was presented as we have here. The provisions of the bonds there were substantially in the same words as here: "No holder of this bond shall have recourse for its payment upon any stockholder of said company, under or in pursuance of any law imposing liability upon stockholders of incorporated companies, whether such law be now or shall hereafter be enacted."

The question is: Does this stipulation in the bond operate as a defense to an action to enforce stockholders' liability? And in that case it was held that it did. The court in that case thought the question before them was entirely different from the one presented in *Railway Co. v. Spangler*, 44 Ohio St., 471, and *Insurance Co. v. Leslie*, 47 Ohio St., 409. Now if this was a question which involved only the private benefit of a creditor, a creditor might waive such liability, but if it was intended to affect citizens of the state other than mere creditors, or was adopted to remedy an existing evil in the management and conduct of corporations, and as an incentive to a more careful management thereof, then it is a question of public policy and becomes binding, and parties may not waive its operation. Evidently such was the intent and purpose of the framers of the Constitution, when they inserted the stockholders' double liability clause in that instrument.

It was discussed fully in the constitutional convention by such jurists as Judge Ranney and others, and its force and effect stated and commented upon—that corporations were engrossing the business interests of the country and had become so numerous throughout the state that it was necessary for the protection and benefit of the public that such provision should be made. These eminent jurists saw in the future the increase, and they referred to it, of corporations, and their absorption of the business of the country and their influence; and they have increased in vast proportions, both as to wealth and numbers. They hold a prominent place to-day in all the busi-

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ness interests of this state and nation. They are accumulating and have accumulated vast influence over those business interests, and over thousands, if not millions, of our people.

It was well, as these eminent jurists stated, that some restrictions should be placed upon such corporations, to bring them somewhere near to the conditions of a simple partnership, and in some way compel the stockholders to see to it that their agents and officers perform their duties and manage the affairs of such corporation with care and fidelity to all, not only with reference to their creditors, but with reference to the public and the laws of the state. And this individual liability is an incentive to compel shareholders to see that their agents and servants carry out and obey the laws of the state, and manage their business with care, honesty and fidelity so as to form a safeguard to the interests of the public as well as that of the shareholders.

That the public is interested in this may be illustrated by reference to the numerous cases in our courts where strangers recover large judgments against corporations for injuries suffered from the dangerous machinery used so largely by these corporations, and the negligence of their agents and servants; and, hence, the public is deeply interested in the careful management of such machinery, and in the carefulness and fidelity of such agents and servants, and in the solvency of such corporations, and in the individual liability of the stockholders for such wrongs in case of the insolvency of such corporations.

In every case that has gone to the Supreme Court on the question of that liability the matter has been spoken of as a question of public policy. In the case of *Brown v. Hitchcock*, 36 Ohio St., 667, Judge White, pages 679, 680, says:

“These provisions are intended to guard against improvidence in contracting debts on behalf of corporations, and to give security to creditors. These objects are best accomplished by attaching the liabilities to those under whose control the corporation is operating, and who are known to those dealing with it as the persons interested.”

So that he considered and regarded it as something more than a mere provision for the creditors' private benefit.

Judge Johnson in his dissenting opinion on another question, page 689, says:

“Under the liberal policy of past state legislation, authorizing corporations for almost every kind of business, having its inception and a large development under the Constitution of 1802 and a still larger one under that of 1851, a vast amount of the individual property of the state is represented by shares in such corporations.

“Any legislation or any decision which materially affects the character and value of this species of property, heretofore so liberally fostered and encouraged, is a matter of great public concern.

“The constitutional provision under consideration was intended to remedy an existing evil, and to provide an additional security to creditors.”

In *Boice v. Hodge*, 51 Ohio St., 236, 238, this is stated by Bradbury, J., page 238:

“The liability of stockholders is founded upon Section 3 of Article XIII of the Constitution of 1851, and Section 3258, Revised Statutes. The subject was of sufficient importance to have thus secured the attention of the convention that framed our present Constitution, and, we think, that in view of this constitutional provision, and the legislation founded upon it, the principle of holding stockholders of corporations liable for corporate debts is within the public policy of the state, and that the statute should be construed so as to constitute it a substantial provision for the benefit of the corporate creditors.”

Insurance Co. v. Leslie, *supra*, came up for consideration under what was known as the Howland Law (Sections 3643, 3644, Revised Statutes). That law provided that in all cases of insurance of a building, the agent of the company should make an examination of the property and its surroundings, and fix the value of the property, and in case of total loss the value fixed in the policy should be the rule of damages. That act was also passed to remedy an evil. Prior thereto when insurance was taken out on a building for an amount larger than its value, and a loss occurred, all that the company had to pay under the conditions of the policy was its actual value at the time of the loss, although it had been receiving premiums on a

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much larger value. In that case it was claimed that this examination was waived. This is part of the syllabus:

"1. The act of March 5, 1879, 'to regulate contracts of insurance of buildings and structures' (now Sections 3643 and 3644, Revised Statutes), applies to all policies issued since it went into effect, insuring any building or structure in this state, against loss or damage by fire. The neglect or omission of the company's agent to make the examination of the property and fix its insurable value, as the statute requires, can not prevent its application to a policy issued by the company, or defeat or affect the operation of the statute.

"2. The statute is founded upon considerations of public policy; its purpose being to exact diligence and care on the part of insurance companies to avoid improper risks and overinsurance, by requiring them to cause their agents to make personal examination of the property, a full description thereof, and fix its insurable value, as well as to protect the insured against unreasonable forfeitures and defenses. The more effectually to accomplish these results, the statute holds the company liable on its policy, unless, after its issue, a change occurs, increasing the risk, without its consent, or the insured has been guilty of intentional fraud, and in case of the total loss of the property by fire, the measure of the liability is fixed at the amount mentioned in the policy, upon which the insurer received a premium. The statute can not be regarded as conferring upon the assured a mere personal privilege which may be waived by agreement. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability."

Now if such a statute as that can be said to have been adopted as a matter of public policy, and embraces something more than mere personal benefit, and can not be waived, how much more should it be in the case before us. If at the time a building is burned the insurer is paid all that it is then worth, he substantially gets back to himself all the loss that he actually suffers. In addition to that there is another matter. That statute may be said to be an incentive to arson, because it encourages a man who owns a building to have it insured at a good big sum by the agent, and then when he finds out that that would be a good sale of it, accomplishes it by the use of a match. But such considerations could not be advanced here, as the very ob-

ject of this statute was to increase the care in the management of these corporations, by extending the liability of the stockholders so as to compel them to see that their agents managed the business with care, honesty and fidelity, and thus subserve the interests of the public and the state.

Entertaining these views we hold that the individual liability of the stockholders must be enforced in this case. Decree accordingly.

SEPARATE PROPERTY OF WIFE.

[Circuit Court of Erie County.]

JULIA S. MANAHAN v. WILLIAM T. HART.

Decided, January 19, 1903.

Husband and Wife—Separate Property of Wife—Liable to What Extent on a Note Executed by Her—Effect of the Act of 1884—Jurisdiction of a Court in this State to Enjoin Proceedings in Another State.

1. Prior to the act of 1884, a married woman could by contract only charge the separate estate owned by her at the time of entering into the contract, and after-acquired property could not be reached under such contract.
2. An Ohio court, having jurisdiction of the parties to an Ohio judgment which has become inoperative, can enjoin the judgment creditor from proceeding in another state to enforce the judgment against property of the debtor in such state.

HAYNES, J.; PARKER, J., and HULL, J., concur.

This case comes to us by appeal and presents a good many novel questions. The case has been argued fully by counsel upon either side and extended briefs and citation of authorities have been offered. I shall not undertake to go through a discussion of the cases; but I will very briefly, within the time I have, state the points and so much of the case as seems necessary to illustrate what we consider the turning point in the case.

On March 19, 1897, William T. Hart commenced an action in the Court of Common Pleas of Lucas County against Julia S.

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Manahan, the present plaintiff, to recover from her the amount of certain promissory notes, which had been executed on April 14, 1879, by Julia S. Manahan and Betsey M. Russell to Mr. Hart, whereby they promised to pay in three years after date to the said Hart the sum of \$986.47. The matter, according to the record, seems to have grown out of some real estate transactions that had occurred prior to that time. The petition nowhere shows that the defendants, or either of them, were married women, while in fact Julia S. Manahan was a married woman at the time of the execution of the note and at the time it was sued upon. After she had been served with process she filed an answer whereby she set up the fact that:

“At the date of the execution of the note, as set forth in plaintiff's petition, she was, and ever since has been a married woman; that at the date above mentioned she had no separate estate, save and except what she theretofore invested in a firm theretofore carrying on the hardware business in the city of Toledo, Ohio, under the firm name of Breckenridge & Company; that about said date, all of said firm property was sold under the orders of this court, and all the proceeds applied in the payment of certain debts of said firm, and the costs of the action in which said order was entered, and that since said time she never has been and is not now the owner or possessor of any separate estate whatsoever, and defendant says that she is not liable in this action on said note set out in said plaintiff's petition.”

There was a reply filed by the plaintiff, and upon the issues joined the parties proceeded to trial. The case was submitted to the court without the intervention of a jury; the record recites that a jury was waived. The court found that the plaintiff was entitled to the following judgment:

“That the defendants, Julia S. Manahan and Betsey M. Russell, are indebted to the plaintiff in the sum of \$3,199.26 with interest thereon from September 13, 1897, at the rate of eight per cent. per annum. And the cause coming on to be heard on a motion for a new trial (the said motion having been filed within the time limited by law), the court on consideration overrules the same, to which ruling of the court the defendant, Julia S. Manahan, then and there excepted.

"It is therefore considered by the court that the said William T. Hart recovered from the said Julia S. Manahan and Betsey M. Russell said sum of \$3,199.26 and interest thereon from September 13, 1897, at the rate of eight per cent. per annum, and that said Julia S. Manahan and Betsey M. Russell pay the costs of this proceeding; for all of which execution is awarded."

At the time this judgment was taken, Mr. Manahan, the husband of Julia S. Manahan, was still alive; but in November, 1901, he died; prior to that time he had lived in the state of New Jersey, and died insolvent. He left certain life insurance policies which he had taken out during his life in favor of his wife; and Mr. Hart now seeks, by proceedings in the state of New Jersey and in the state of New York, to subject the insurance money to the payment of his judgment. Thereupon the plaintiff, Mrs. Manahan, brought her suit in the Court of Common Pleas of Erie County against Hart, who is a resident of Erie county, seeking to enjoin him from proceeding with those cases, or with the collection of the above judgment; and it is claimed that, while the judgment is a personal judgment against Mrs. Manahan, that under the law of the land as it existed at the time the note was executed, the plaintiff was not entitled to a personal judgment against Mrs. Manahan, but only to a judgment that should reach the estate that she had at the time the note was signed. The practical result of this would be, if the property which she owned at the time the note was signed was all gone, as now claimed, that the plaintiff would not be entitled to issue execution against any other property, whether a policy of insurance or other property that she has acquired or received since the date of the note; in short, that the only effect of that judgment would be to exhaust the separate property of which she was possessed at the time the note was executed, and having done that the judgment would be, so to speak, *functus officio*; that it would in fact be inoperative.

It is said on the other hand that under the laws as they existed when the suit was commenced, in 1897, that the plaintiff was entitled to a personal judgment against Mrs. Manahan that would enable the plaintiff to subject any property which

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she had at that time, or which she might thereafter acquire before the judgment was satisfied.

Now to go through all the cases and all the legislation would be a very long task. Counsel for the plaintiff, with great industry, has brought the legislation on the subject and the decisions in his brief to our attention, and the brief has proved of great use to us in investigating the questions arising in the case.

Now a great deal of this trouble arises from the obscurity in which the statutes have been left; and that arises from the habit, as it seems to us, that has prevailed in the Legislature in amending some one section of the statute, without looking to other statutes that may be affected by it. And, while in 1874, they passed a law that *seemed* to give the courts a right to render a personal judgment in all cases against a married woman, they left the law as it *was* in regard to her power to make a contract, and it was not until 1884, I think, that the law was changed, so that a married woman was allowed to contract as fully as a *femme sole*. In 1879, 76 O. L., 3, it was provided, under Section 28, that:

“Where a married woman is a party, her husband must be joined with her, except that where the action concerns her separate property or is upon a written obligation, contract or agreement, signed by her, or is brought by her to set aside a deed or will, or is brought by her to collect a legacy; or if she be engaged as owner or partner in any mercantile or other business, and the cause of action grows out of or concerns such business, or is between her and her husband, she may sue or be sued alone. And in all cases where she may sue and be sued alone, the like proceedings shall be had, and the like judgment rendered and enforced in all respects as if she were an unmarried woman. And in every such case, her separate property and estate shall be liable for any judgment rendered therein against her to the same extent as would the property of her husband were the judgment rendered against him.”

Now while the act changed the code in regard to practice, the Supreme Court have held that was all it had accomplished and that it did not change the law in regard to the power of the wife to contract or clothe her with any greater rights than she had prior to the passage of that act. In *Sticken v. Schmidt*,

64 Ohio St., 354, the Supreme Court rendered a decision touching the question. In that case it appeared that in 1876 a Mrs. Kock signed a note to Mrs. Schmidt for \$400, and that note ran along for a long time. Mrs. Kock was a married woman. Her husband afterwards died and left her some insurance money, and then Mrs. Schmidt concluded it was time to sue the note. She brought suit against Mrs. Kock. The only property that Mrs. Kock had in 1876 at the time she executed the note was an insurance policy on the life of her husband for \$3,000. He had paid the amount of the premium until the year before he died; after that his wife paid it herself. She received that money and it was that money they were seeking to reach. The Supreme Court held that suit could not be maintained; that the wife had no property in 1876, because they held that policy of life insurance was not property within the meaning of the law. Judge Williams, in delivering the opinion, said, p. 357:

“Since the execution of the instrument, the powers of married women to enter into contracts, and the remedies thereon against them, have been materially enlarged. Under the law then in force, with a few exceptions not important here, they were incapacitated by coverture to create a personal legal liability by contract, or bind their general estate. The extent of their contractual capacity was to charge their separate estate, in equity, for their obligations; and the remedy was to pursue and subject such property to their satisfaction; personal judgment on which execution could issue was not authorized. (Citing authorities.)

“The personal property which then constituted a separate estate that the married woman could charge with her debts, consisted of such property of that kind as belonged to her at her marriage, or came to her during coverture by gift, bequest, or inheritance, or by purchase with her separate means, or became due as wages of her separate labor or grew out of a violation of her personal rights (68 O. L., 48).

“To give rise to an intention to charge her separate estate by her contract, and create such a charge upon it, it was essential that such property should belong to her at the time the contract was entered into. And it was the settled law that her engagement entered into when she had no separate property would not bind property thereafter acquired, nor would such after acquisition give validity to a previous engagement entered into when she was not the owner of a separate property.”

Then there was a discussion whether she had any interest by virtue of the policy of insurance at the time she signed the note which could be said to be property which she might charge; the court holds that she had no property, and he further says:

“The principal reliance of the plaintiff is placed on the proposition that the insurance money, when paid to the defendant, took the place of the policy, and by relation became her separate property as of the time of the contract. This position, we think, can not be maintained. The augmented value of the policy arising from the payment of the premiums and performance of its conditions subsequent to the contract, resulting in the final collection of the insurance money, was after-acquired property, which after-acquisition, as has already been seen, could not relate back so as to give validity to a contract invalid when made, or became chargeable for its satisfaction.”

The only difference in that case and this is practically that at the time the note was given, Mrs. Manahan did have some property in the partnership, as set forth in her answer in the original case. Now, I may say here before passing further, that this case of *Hart v. Manahan* (unreported) was taken by the defendants to the circuit court, and it was objected that no suit could be maintained against her, and that no judgment could be rendered against her *in personam*. That case was very fully argued by Mr. Alford on one side and Mr. Kinney upon the other. The court at that time was composed of Judge Shearer, who sat in the place of Judge King, Judge Parker and myself. Judge Shearer was very earnest in his views that no personal judgment could be rendered, and cited *Ankeney v. Hannon*, 147 U. S., 118; but after a very full discussion of the matter, we came to the conclusion, a majority of us, to affirm the judgment, relying upon the case of *Patrick v. Littell*, 36 Ohio St., 79.

Now, when this note was signed in 1879, the wife had no power to contract at law; the note was void; the only power she had was to charge her separate estate. The record shows that she had inherited property which was her own separate property; that she had invested it in the firm of Manahan & Breckinridge. Therefore, the suit might be maintained against her.

But how far is that suit to go; to what point? It would seem that in drawing the statutes or changing the statutes the Legislature supposed that by amending Section 28 of the code (see Sections 4996 and 5319, Revised Statutes.), that they could enlarge the remedy so that it would include property she might thereafter have and an execution might be levied against her the same as against her husband if the judgment was rendered against him, and there are some statements in some of these cases cited in *Williams v. Urmston*, 35 Ohio St., 296, and *Patrick v. Littell*, 36 Ohio St., 79, and some others where the general language is used by the judges deciding the cases that looks toward that result. Now, if she had no power to make a contract; if she only had power to charge her separate estate; if there had been an attempt made under the guise of amending Section 28 to enlarge her liability and say because she might charge her present separate property at the time the note was given that that should operate to charge or render liable all the property she would have in the future, it would seem that that would be changing the liability of the parties, change the results and effect of the contract and make her liability much larger than it was at the time the contract was made. I suggest that the statute, if so construed, would be retroactive in its character and might therefore be unconstitutional.

And that brings us down to the question on which there has been no decision directly of the Supreme Court, and is the vital question in this case; and that is whether, by virtue of the note Mrs. Manahan drew, she charged only the property that she had at that time or whether thereby she charged everything she then had or might have in time to come. Now, this note is a promise without charging anything. It did not charge anything in the future, or attempt to charge anything in the future. The holding of a majority of all the courts, we think, is that the wife only charges so much property as she has at the time of signing the note. It is termed an instrument *in presenti* and charges her then separate estate, and the authorities, in a majority of the cases, as I have said, are that it does not charge any after-acquired property; but if by special agreement or arrangement she agrees to charge her after-acquired property,

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some courts have suggested that might be carried out as an arrangement or intention, and ought to be given some effect. *Ankeney v. Hannon*, 147 U. S., 118, is the only case we know of that touches on the Ohio statutes. That is a case that went up from the circuit court of the United States, southern district of Ohio. The cause of action arose at Xenia, Greene county, Ohio. In that case Joseph E. Hannon, Clara M. Hannon and William H. Hannon executed notes to the amount of \$14,969.31, dated March 25, 1880—just a year after this note in question here was dated—payable to the order of Joseph E. Hannon, subsequently transferred to the complainants before maturity. Mrs. Clara M. Hannon, when she signed the note, wrote on it “Mrs. Clara M. Hannon signs this note with the intention of charging her separate estate, both real and personal.” That case was taken to the Supreme Court of the United States. At the time she signed the note it appeared she had some property of but small value. But subsequently she received from her relatives, her father, perhaps, an estate amounting to \$200,000. It was sought to collect this note out of it. The case was decided, opinion announced by Mr. Justice Field, who cites the statutes of Ohio at length. He cites the statute which provides for a separate estate and as to making a contract in regard to matters in which the estate was concerned, and so on. He says that in the case of *Levi v. Earl*, 30 Ohio St., 147, the Supreme Court of this state held that the provisions of the section I have referred to, passed March 30, 1874, and carried on down in different forms, does not enlarge the capacity of a woman to make contracts, except where it is specifically mentioned. And he proceeds to say, p. 432:

“It has also been held by the Supreme Court of Ohio that Sections 4996 and 5319, Revised Statutes, which embody the provisions of the act of March 30, 1874, were intended simply as an amendment to the code of civil procedure and did not affect or enlarge the rights or liabilities of married women, but related merely to the remedy. (Citing cases.)

“The powers and liabilities of married women not being affected in any particulars, except those mentioned, by the legislation of Ohio previous to the execution of the notes in controversy, the defendant, Mrs. Hannon, did not charge her sub-

sequently-acquired estate at law for their payment when she signed them in connection with her husband. Even if under the legislation in question, she would by the decision in *Williams v. Urmston*, 35 Ohio St., 296, which is said to qualify in some respects, the decisions in *Levi v. Earl*, have charged at law her separate estate existing at the time of the execution of the notes in the absence of the express statement in them that she intended thus to charge it, there is nothing in the legislative provisions adopted which enlarges her power at law to charge any future-acquired estate. The question then remains to be considered whether her after-acquired estate is chargeable in equity. That is to be determined by the ordinary rules of equity, and we think it is clear that the contracts of married woman are not chargeable in equity upon their subsequently-acquired estates."

I will not stop to read the whole opinion; he cites cases and discusses them at length, and then holds that in cases of this kind the wife does not charge her subsequently-acquired estate by signing a paper in the form in which this note was signed. He goes on to say, p. 434:

"In this case, the amended bill avers that the defendant, Mrs. Hannon, executed the notes in question, with the intention of charging her after-acquired property; but inasmuch as her contract is in writing, the averment can be regarded only as the pleader's conclusion, which must be determined by the application of the law to the undertaking itself. There is nothing in the written agreement which makes any reference to an after-acquired estate."

In conclusion he says, p. 436:

"In view of the considerations stated, and the decisions mentioned, and numerous others which might be cited, we are of opinion that in Ohio the separate property of a married woman could not be charged in equity by contracts executed previous to its existence, for the obvious reason that in reference to such property the contracts could not be made. The after-acquired estate was not at the time available in a court of equity to meet the contracts, for at their date it had no existence."

We think that is a clear statement of the law so far as our judgment may be of any value; we are inclined to the same conclusions, that is, we hold under the authorities cited, under the general principles of law, that Mrs. Manahan did not intend at

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the time she executed this paper to subject any after-acquired property to the payment of the debt. I say if I had this case before me now I would simply modify it so as to hold that she signed the note, and that whatever judgment was taken should only proceed against the property that she had at the time the note was made. The law, as I have said, has been somewhat obscure; but we think this view taken of it affords a rational, just and equitable conclusion in regard to the matter with reference to these parties.

Now there is another question that arises here of a good deal of importance, so that we mention it now. In this case, this judgment was rendered in the Court of Common Pleas of Lucas County. This petition is filed in the Court of Common Pleas of Erie County to enjoin the collection of this judgment and proceeding with it, and it is claimed we have no power to modify this judgment in this action, and we have no right to enjoin a resident of Ohio from proceeding in a case in another state to collect his claim against a citizen of that state or any judgment he may have against that citizen. Mrs. Manahan is here and is in this court. Mr. Hart is a resident of this state and is here. While we do not seek to modify that judgment, yet we do hold that the judgment has become (perhaps a fair word to use is) exhausted, or inoperative. It appears that the property that she held and had at the time the judgment was taken had been utterly exhausted, and that ended the validity of the judgment. To enable him to bring suit upon that judgment would be to enlarge her capacity to contract and to hold that she contracted at the time she signed the note for more than by the law of the land at the time she could contract, or could undertake. We see no reason why, the parties being before us, we may not enjoin the party from proceeding with the collection of the claim, or issuing an execution, in this state, or from proceeding in another state to enforce a judgment by suits upon the judgment, as required. We know there is some contradiction of the authorities upon the subject. The authorities upon the subject have been elaborately discussed; but we think that the better principle is that this injunction may issue. We know of no case that better states our views of the law governing this

case than the case of *Dekon v. Foster*, 86 Mass. (4 Allen), 545; the syllabus is:

"This court has jurisdiction in equity, upon a proper case being made, to enjoin a citizen of this commonwealth from availing himself of an attachment of personal property in another state, in an action against a debtor who is insolvent under the laws of this commonwealth, and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with knowledge that such proceedings were about to be instituted, and with a view to obtain a preference."

It is claimed here that some letters had been written by Mrs. Manahan at a subsequent time in which she recognized the validity of this note. Sufficient to say here that those alleged letters, recognitions or promises, have never been sued on by the defendant in this case and that question ought not to have any operation or effect upon this judgment.

A decree may be drawn enjoining the parties from collecting this claim.

E. J. Marshall and *E. B. King*, for plaintiff.

Theodore Hoard and *Malcolm Kelley*, for defendant.

EQUIVOCAL REJECTION OF A LEASE BY AN ASSIGNEE.

[Circuit Court of Lucas County.]

ABEL M. RAWN, ASSIGNEE OF BAIRD & FIELD, v. THE HOTEL MADISON COMPANY.

Decided, January 25, 1904.

Assignee—Gives Notice that He Will Not Accept Lease—But Thereafter Permits the Probate Court—To Order a Continuance of the Business Without Objection on His Part—And Offers the Lease for Sale—Assignee Liable for the Rent.

Where an assignee for the benefit of creditors of a lessee of real property occupies the same, but gives formal notice to the owner of the property that he does not desire to accept the terms of the

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lease, and indicates that he would consider better terms, and thereafter in a proceeding which was not adversary, permits the probate court, without objection on his part, to order a continuance of the business carried on therein, and has the lease appraised and offers it for sale and sells it, his action amounts to an obligation to pay the rent during the interim of his occupancy, and a verdict finding him liable for this rent will be affirmed.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This action comes into this court on error. The action in the court below was by The Hotel Madison Company against Abel M. Rawn, assignee of Baird & Field, to recover rental on account of the occupation of the Hotel Madison by Rawn as such assignee, and the trial resulted in a verdict in favor of the plaintiff below for the amount claimed, to-wit, \$832.80, which included the interest.

It appears that Baird & Field had been occupying the Hotel Madison, as tenants of The Hotel Madison Company; that they became insolvent and made an assignment of all their property, including this lease and leasehold interest, to Abel M. Rawn, under the statutes of the state for the benefit of creditors. That after Rawn became assignee he continued to occupy the hotel property for the period on account of which this claim for rental is made, to-wit, from the 12th day of January, 1902, to the first day of August, 1902, inclusive. The lease under which Baird & Field occupied provided for the payment of a rental of \$500 per month, and the amount recovered is at the rate of \$500 per month for this period.

It is averred in the petition that Rawn, after he became assignee, continued to occupy under this lease. That is denied in the answer. It is admitted that the firm mentioned was in possession of the hotel property, and it is averred that soon after the assignment the defendant, finding that the lease described in the plaintiff's petition had been executed, notified the plaintiff that he, as assignee, would not accept the terms of said lease and would not be bound by the same; and there are averments to the effect that at the instance and request of The Hotel Madison Company the assignee continued to occupy the premises for the period on account of which this action is brought for rental. And it is also claimed that the assignee occupied somewhat under compulsion—that is, that the assignee not only

desired to give up the lease and the property, but that he desired to vacate the premises, and that by the order of the probate court, made at the instance of the Hotel Madison Company, he was required to continue the use and occupation of the premises, and, therefore, it is contended on behalf of the assignee that one of two conditions resulted from that; i. e., either that he is liable simply for a *quantum valebant*, or that he is not liable at all, because, being in at the instance of the Hotel Madison Company, at its request, to preserve its property, for its interest, he must be held to have had this use of the premises tendered to him as a gratuity, and that therefore he is not liable to pay anything for the use and occupation; and it is also said in that connection that as a matter of fact the rental provided for by the lease was very excessive, more than any one could afford to pay for the premises, and that during this period the assignee lost money in running the hotel, and that if he is required to pay rental at the rate of \$500 a month it will result in taking that much money that ought to go to other creditors and paying it to the Hotel Madison Company, in effect as if it were a preferred creditor, because it is to be paid as a part of the costs and expenses of administration. The whole question turns upon whether the assignee elected—took such action as amounts to an election—to occupy these premises under the lease. If he did, then he is bound to pay the rental according to the terms of the lease. If he did not, if he rejected the lease, then perhaps one of the two possible results stated by the plaintiff in error would follow: either that he would be liable only for a *quantum valebant* or for nothing.

It appears that the lease in question was made on the 18th day of September, 1900, to one Leona T. Field and that she subsequently assigned it to The Frisco Hotel Company. The lease provides that it may not be assigned without the consent of the lessor, and there is no formal assignment and no formal assent by the lessor to an assignment from the Frisco Hotel Company to Baird & Field, and therefore it is contended on behalf of the plaintiff in error that Baird & Field were not in fact lessees under this lease and that it was not an asset conveyed by the deed of assignment, and that, therefore, the judgment

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is wrong. But we are well satisfied from the evidence that Baird & Field had acquired the rights of the Frisco Hotel Company, with the assent of the Hotel Madison Company, and that by the agreement of Baird & Field with the Hotel Madison Company Baird & Field were occupying as tenants of the Hotel Madison Company under this lease at the time the assignment was made, and that, therefore, none of the parties were in a position to dispute that the rights of the lessees were assigned and conveyed by Baird & Field to Abel M. Rawn by the deed of assignment. Now it appears that the assignee, after accepting the assignment, continued, as I have said, in the occupation of the hotel. It seems that some time before that the boarding of guests by the lessees had been discontinued; that the guests of the hotel were generally roomers, some few being transients; that the assignee carried on the business during this time for which the rent was charged about as the assignors had theretofore carried it on. But it also appears that on June 16, 1902, shortly after the deed of assignment was filed, this notice was served upon the Hotel Madison Company:

“TOLEDO, OHIO, June 16th, 1902.

“THE HOTEL MADISON COMPANY;

“Toledo, Ohio.

“*Gentlemen:*

“At the request of A. M. Rawn, assignee of Baird & Field, you will notice that as such assignee he does not desire to accept the terms of lease of Hotel Madison. Will you please state the amount you will charge for the occupancy of the building by Mr. Rawn until such time as he is able to sell its contents, which are assets of the firm of Baird & Field? It is desirable that you make an early answer.

“Very truly yours,

“C. A. THATCHER.”

Richard Waite, as secretary of the Hotel Madison Company, acknowledges service of this notice upon the same day.

The order of the probate court, to which I have referred, as it appears in the record, has no date; it reads as follows:

“IN THE MATTER OF THE ASSIGNMENT OF BAIRD & FIELD.

“The Hotel Madison Company through its attorney in open court having made application that the assignee in above matter

be ordered and directed to continue the business of the assignors; the court being fully advised and there being no objections offered, and the court deeming it for the best of all parties in interest, hereby orders and directs said assignee to continue the business of the assignors, and to furnish accommodations to guests now in said hotel and those who may thereafter apply."

But in addition to this evidence indicative of the purpose of the assignee, we have his own testimony and certain other records introduced in evidence, which disclose that this proceeding in the probate court which resulted in this order was not adversary, as the order recites—there was "no objection offered" to its being made—and the assignee testifies, in effect, that he had gone to the probate judge and talked with him about this matter—about his situation there—and suggested that some order might be made that would protect him so that he might know what his responsibilities would be in the premises. His testimony upon that subject appears upon pages 23 and 24 of the record:

"Q. I understood you to say, in your direct examination, to Mr Thatcher—after calling your attention to this notice—he asked you why you didn't follow it up, and you stated that you went to the probate court and consulted with him, and he told you you had better keep it open, and at that time this order was shown you? A. No, sir; it was not.

"Q. If you made that statement, you were incorrect? A. Not necessarily; that order was made to put me right with the court; the court said he would have the order made; he had already made it verbally some time before this. I said to him I wanted it right and he said 'I will have the order made.'

"Q. This was made at your request, in order to have something on record? A. I don't know that it was made at my request.

"Q. You did ask to have something on record? A. Yes. I wanted something on record, to show what I was doing and why I was doing it.

"Q. This was the order that was made then? A. I expect it was; there was something made.

"Q. The court told you he would do that, did he? A. I think he did.

"Q. You were satisfied with that and went on with the

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business? A. I did before and I went on, and that is what I was doing—

“Q. And you went over and had a talk with the court?

A. Yes—in order to have something definite.”

It appears from that and other evidence in the case that this was not an adversary proceeding. We regard that evidence as competent and as not contradicting the record of the probate court in any respect. But, moreover—and a matter of much more influence with us—it appears that the assignee offered for sale the property of the assignors, consisting of chattels and furnishings of the hotel, and that he was not able to make a judicious sale, and that thereupon he reported to the probate court that he would not be able to make a judicious sale unless he also sold this lease with the property; that persons who thought of buying the property had said to him, in effect, that they did not desire to buy it and be obliged to remove it at once, but if they could buy the lease giving them the right to occupy the hotel, they would feel disposed to buy the chattel property. And in pursuance of that representation to the probate court he was authorized to sell the lease and did sell it. Now it seems to us that this notice that he did not desire to occupy the property under the lease, and indicating a desire to obtain better terms from the Hotel Madison Company, is not an unequivocal rejection of the lease; and that this order of the probate court was not in the form of an injunction upon him in an adversary proceeding compelling him to occupy the hotel; but, in the light of his evidence, that it is an order apparently acceptable, if not positively agreed to by all parties concerned, and that his action in having the lease appraised—the leasehold interest—and offering it for sale and selling it, is an unequivocal acceptance under the lease; that he can not blow hot and cold with reference to this matter; that if the lease were rejected and made a dead letter it could not be revived afterwards to be sold; that if it were kept alive it was kept alive by virtue of the fact of payment or the assumption of an obligation to pay rental for this interim on account of which this action is prosecuted, and we think it very clear under this evidence that the verdict of the jury finding him

liable for the amount of the rental sued for was right, and, therefore, the judgment of the court below will be affirmed.

Charles A. Thatcher, for plaintiff in error.

F. M. Dotson, for defendant in error.

JURIES IMPANNELED UNDER WRONG LAW.

[Circuit Court of Franklin County.]

GEORGE T. BARLOW v. THE STATE OF OHIO.

Decided, February 15, 1904.

Criminal Law—Jury Law of September, 1902—Not Applicable to Offenses Committed Prior to That Date.

One indicted for an offense committed prior to September 30, 1902, can not be tried before a petit jury impaneled, and under an indictment returned by a grand jury impaneled under the act of September 30, 1902, providing for the appointment of a jury commission for the selection of jurors.

SULLIVAN, J.; SUMMERS, J., and WILSON, J., concur.

The plaintiff in error was indicted for embezzlement April 23, 1902. October 22 the grand jury returned another indictment for the same offense.

January 3, 1903, the first indictment was nollied and plaintiff was put upon trial in the court below on second indictment March 9, 1903. He was found guilty as charged in the indictment. A motion for new trial was filed, which was overruled, and he was sentenced to the penitentiary for the period of one year.

On the day set for trial (March 9, 1903) the accused filed a challenge to the array on the ground that the crime with which he was charged was alleged to have been committed on the 19th of February, 1902, and that on the — day of February, 1902, prosecution for the offense was commenced against him in police court of the city of Columbus, and on March 5, 1902, he was bound over to appear before the grand jury, and that he had ever since the date above named been in the custody of the court.

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That on September 30, 1902, the jury law that was then in force when said alleged crime was committed was repealed by an act of the General Assembly, and an amended jury law was enacted for the appointment of a jury commission and the selection of jurors, which repealed the former jury law that existed at the time said alleged crime was committed.

That the grand jury drawn and impaneled returned the indictment in the case, and the petit jury selected and called to try the accused were each so selected, drawn and called under the act of September 30, 1902, in violation of the rights and liberty of the accused.

The facts stated in this motion were conceded to be true, except as to the rights and liberty of the accused being violated thereby. The motion was overruled, and the accused put upon trial, to which action of the court the accused at the time excepted, and his exception was entered upon the record. The overruling of this motion is alleged as one of the grounds of error in the petition in error, and also set forth in the motion for a new trial.

The court erred in overruling this motion and the accused was prejudiced thereby. *Bach v. State*, 38 Ohio State, 664.

There are no other errors prejudicial to plaintiff in error apparent upon the record, and for the error alone stated it follows that the judgment must be reversed and cause remanded to be proceeded in according to law.

S. Hamberton, for plaintiff in error.

Taylor & Seymour, for defendant in error.

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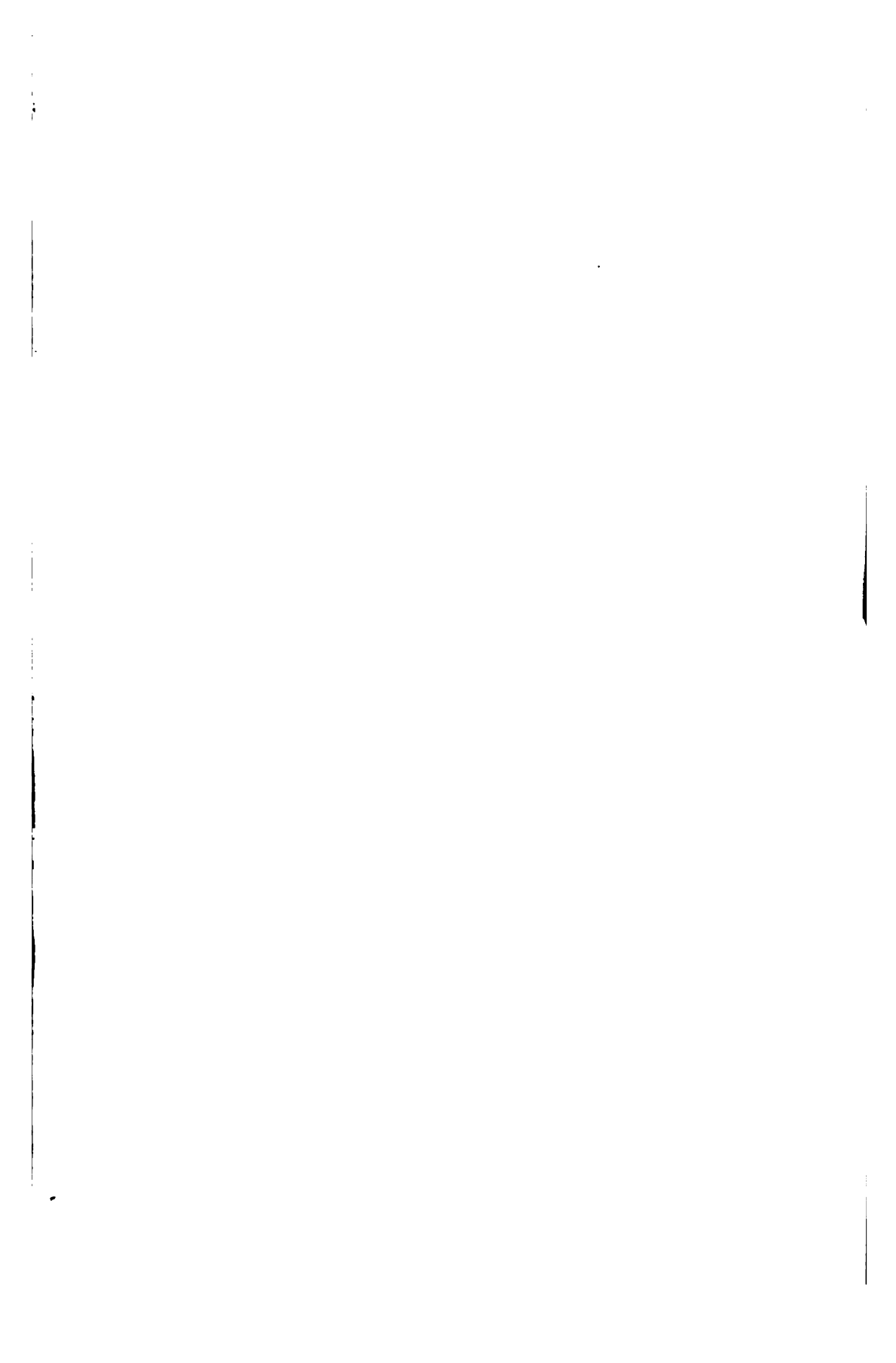
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